

CLERK'S COPY

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1938

No. 449

NEWARK FIRE INSURANCE COMPANY,
APPELLANT,

vs.

STATE BOARD OF TAX APPEALS AND THE CITY
OF NEWARK

APPEAL FROM THE COURT OF ERRORS, AND APPEALS OF THE STATE
OF NEW JERSEY

FILED OCTOBER 31, 1938.

SUPREME COURT OF THE UNITED STATES

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[fol. 1] **IN SUPREME COURT OF NEW JERSEY**

WRIT OF CERTIORARI

State of New Jersey to. State Board of Tax Appeals and
City of Newark, a Municipal Corporation of the State of
New Jersey, Greeting:

We, being willing for certain reasons, to be certified of
a judgment of the State Board of Tax Appeals filed July
7, 1936, affirming the action of the Essex County Board of
Taxation in denying the claim of Newark Fire Insurance
Company for exemption from taxation on certain personal
property owned by it for the year 1935 and sustaining as-
sessment for taxation on said property for said year, do
command you that the said judgment together with the peti-
tion of appeal, the record taken before said State Board of
Tax Appeals and the opinion of said State Board of Tax
Appeals with all things touching and concerning the same
as fully and entirely as before you they remain, to our Jus-
tices of the Supreme Court at Trenton, on the 19th day of
January, next, you certify and send together with this writ,
that therein may be done what of right and according to the
laws of this State should be done.

Witness, Thomas J. Brogan, Esq., Chief Justice of our
Supreme Court, at Trenton, this 10th day of October, 1936.
Fred L. Bloodgood, Clerk.

Arthur T. Vanderbilt, Attorney.

This writ is allowed. Let it be sealed.

Dated October 10, 1936.

Charles W. Parker, Justice of the Supreme Court.

[fol. 2] **IN SUPREME COURT OF NEW JERSEY**

NEWARK FIRE INSURANCE COMPANY, Prosecutor,
VS.

STATE BOARD OF TAX APPEALS and CITY OF NEWARK, a Muni-
cipal Corporation of the State of New Jersey, Defend-
ants

On Certiorari

ACKNOWLEDGMENT OF SERVICE—Filed October 16, 1936

Service of writ of certiorari returnable January 19, 1937
is hereby acknowledged this 14th day of October, 1936.

Charles E. Cook, Secretary, State Board of Tax Ap-
peals. Frank A. Boettner, Attorney of Defendant,
City of Newark.

[fol. 3] IN SUPREME COURT OF NEW JERSEY

[Title omitted]

RETURN TO WRIT—Filed November 19, 1936

The State Board of Tax Appeals doth herewith send to the Supreme Court of the State of New Jersey the petition, judgment and proceedings in the matter of the appeal of Newark Fire Insurance Company, from the assessment of property located in the City of Newark, for the year 1935, as within it is commanded, as by the transcript under the seal of said Board hereto annexed more fully appears.

State Board of Tax Appeals, by Charles E. Cook,
Secretary. (Seal.)

[fol. 4] BEFORE STATE BOARD OF TAX APPEALS

In the Matter of the Application of NEWARK FIRE INSURANCE COMPANY for the Reduction of the Tax Assessment for the Year 1935 on Personal Property

PETITION—Filed December 14, 1935

To the State Board of Tax Appeals:

Your petitioner, Newark Fire Insurance Company, Statutory Agent's Office—41 Clinton Street, Newark, N. J. Principal Office—150 William Street, New York City, respectfully shows that Newark Fire Insurance Company is a fire insurance company duly organized under the laws of the State of New Jersey, having its principal office and business situs at 150 William Street, in the City of New York, County of New York and State of New York, and is the owner of certain personal property consisting of stocks, bonds, other securities and accounts receivable.

That said property has been assessed for the purpose of taxation for the year 1935 at a valuation of ** Land, \$—;

* Where city property is the subject of appeal, care should be taken to describe the lot, block and street number so that the same may correspond with the collector's books.

** This amount should be the original valuation of the property, as it appears on the tax bill.

improvement, \$—; Personal, \$1,069,000; Total \$1,069,000, which assessment your petitioner is aggrieved, because the said assessment is in excess of its true value and because petitioner has no legally taxable capital stock paid and accumulated surplus after deducting liabilities and exemptions allowed by law, and because petitioner is not taxable in the City of Newark because its principal office and business situs is in the City of New York, State of New York, and not in the taxing district of the City of Newark.

[ol. 5] That an appeal from said assessment has been filed with the Essex County Board of Taxation, which appeal said board disposed of as follows:

Affirmed.

Your petitioner, therefore, prays that said assessment *** Land, \$—; Impt., \$—; Pers., \$1,069,000; Total, \$1,069,000, for the year 1935, be cancelled.

Dated December —, 1935.

(Signed) Newark Fire Insurance Company, by Harold Warner, President.

Duly sworn to by Harold Warner. Jurat omitted in printing.

[ol. 6] STATE OF NEW JERSEY,
County of Essex, ss:

William Blackman being duly sworn according to law, his oath says that he served a copy of the above petition and affidavit on Frank A. Boettner (Attorney or Clerk) of the City of Newark (name of taxing district), personally, this 12th day of December, 1935.

William Blackman.

Sworn and subscribed before me this 12th day of December, 1935. Evelyn T. Adam, a Notary Public of New Jersey. (Seal.)

*** This amount should be the valuation to which the assessment was changed by the County Board of Taxation, on appeal.

STATE OF NEW JERSEY,
County of Essex, ss:

William Blackman being duly sworn according to law, on his oath says that he served a copy of the above petition and affidavit on William S. Macksey (President or Secretary) of the Essex County Board of Taxation, personally, this 12th day of December, 1935.

William Blackman.

Sworn and subscribed before me this 12th day of December, 1935. Evelyn T. Adam, a Notary Public of New Jersey. (Seal.)

[fol. 7] BEFORE STATE BOARD OF TAX APPEALS

[Title omitted]

In the matter of the application for cancellation, and in the alternative, for reduction of a personal property tax upon capital stock and accumulated surplus of Newark Fire Insurance Company, a New Jersey corporation claiming to have a business situs in New York.

Appearances:

For Appellant, Arthur T. Vanderbilt, Esq.

For Respondent, Frank A. Boettner, Esq., by John A. Matthews, Esq.

OPINION—Filed July 7, 1936

WEAVER, President:

The appellant, Newark Fire Insurance Company, is a corporation organized under the laws of the State of New Jersey, having its registered office at Newark, New Jersey. Its main business and executive office is located in New York City. All books of the company, except those required by law to be kept in this State, are retained in its New York office, where its general accounts are kept. With the exception of a small deposit in New Jersey, all of its cash and securities are in banks located in New York City. For the past six years, the general affairs of the company have been conducted from the New York office,

the only business carried on from its registered office in Newark being a local or regional claim and underwriting department.

The Board of Assessors of the City of Newark levied upon the company's capital and accumulated surplus a personal property assessment in the sum of \$1,069,000, which assessment was affirmed by the Essex County Board of Taxation on appeal. Appellant seeks to have this assessment cancelled (or in the alternative reduced), upon the following grounds:

1. The business situs of the company is in the City of New York.

2. (a) That reserves for unearned premiums, (b) reserves for taxes, and (c) agency balances over 90 days old, should not be included in its capital and accumulated surplus, thereby reducing the capital and accumulated surplus by the amounts represented by said items, and that after the deduction of property claimed to be exempt no taxable capital or accumulated surplus remains.

3. That cash on hand or on deposit is exempt and should be deducted from its taxable capital and accumulated surplus.

The company is taxable under Section 307 of the General Tax Act, P. L. 1918, p. 858, which provides:

[fol. 9] "Every fire insurance company and every stock insurance company other than life insurance shall be assessed in the taxing district where its office is situate, upon the full amount of its capital stock paid in and accumulated surplus; the real estate belonging to every such corporation, however, shall be taxed in the taxing district where such real estate is situated, and the amount of assessment upon said real estate shall be deducted from the amount of any assessment made upon the capital stock and accumulated surplus, as herein provided for; no franchise tax shall be imposed upon any such fire insurance company or other stock insurance company included in this section."

Appellant's claim that it is not taxable in this State because its personal property and business situs are located in New York is without merit.

The company is incorporated under the Insurance Companies Act of this State (2 U. S. p. 2839), Section 3 of which provides that its certificate of incorporation shall contain—

“The place where the principal office of said company is to be located and its general business conducted, which shall be within this State; . . .”

This provision has been carried into the amendment of 1929, Chapter 6, page 18. The appellant accordingly is required to maintain its principal office and carry on its general business within the State of New Jersey.

Section 305 of the General Tax Act, P. L. 1918, page 856, provides that:

[fol. 10] “Corporations of this State shall be regarded as residents and inhabitants of the taxing district where their chief office is located, and their personal property shall be taxed the same as that of an individual except as in this act otherwise provided; . . .”

In *Union Refrigerator Transit Company v. Kentucky*, 199 U. S. 194, the United States Supreme Court said:

“ . . . there is an obvious distinction between the tangible and intangible property, in the fact that the latter is held secretly; that there is no method by which its existence or ownership can be ascertained in the State of its situs, except perhaps in the case of mortgages or shares of stock. So if the owner be discovered, there is no way by which he can be reached by process in a State other than that of his domicile, or the collection of the tax otherwise enforced. In this class of cases the tendency of modern authorities is to apply the maxim *mobilia sequuntur personam*, and to hold that the property may be taxed at the domicile of the owner as the real situs of the debt, and also, more particularly in the case of mortgages, in the State where the property is retained. Such has been the repeated rulings of this court. *Tappan v. Merchants' National Bank*, 19 Wall. 490; *Kirtland v. Hotchkiss*, 100 U. S. 491; *Bonaparte v. Tax Court*, 104 U. S. 592; *Sturges v. Carter*, 114 U. S. 511; *Kidd v. Alabama*, 188 U. S. 730; *Blackstone v. Miller*, 188 U. S. 189.

“If it occasionally results in double taxation, it much oftener happens that this class of property escapes altogether. In the case of intangible property, the

does not look for absolute equality, but to the more practical consideration of collecting the tax upon such property, either in the State of the domicile or the situs."

In the case of *Cream of Wheat Company v. County of Grand Forks*, 253 U. S. p. 325, the United States Supreme Court held that the limitation of the Fourteenth Amendment upon the power of a State to tax the property of its residents which has acquired a permanent situs outside of the State does not apply to intangible property, even though it has acquired a business situs and is taxable in another State. In that case the Court said:

"The company was confessedly domiciled in North Dakota; for it was incorporated under the laws of that State. As said by Mr. Chief Justice Taney, 'It must dwell at the place of its creation, and cannot migrate to another sovereignty.' *Bank of Augusta v. Earle*, 13 Pet. 519, 588. The fact that its property and business were entirely in another State did not make it any the less subject to taxation in the State of its domicile. The limitation imposed by the Fourteenth Amendment is merely that a State may not tax a resident for property which has acquired a permanent situs beyond its boundaries. * * * The limitation upon the power of taxation does not apply even to tangible personal property without the State of the corporation's domicile if, like a seagoing vessel, the property has no permanent situs anywhere. *Southern Pacific Co. v. Kentucky*, 107 U. S. 127, 222 U. S. 63, 68. Nor has it any application to tangible property, *Union Refrigerator Transit Co. v. Kentucky* supra, p. 205; *Hawley v. Malden*, 232 U. S. 1, 11, even though the property is also taxable in another State by virtue of having a 'business situs' there. *Fidelity & Columbia Trust Co. v. Louisville*, 245 U. S. 54, 59."

In *Maguire v. Trefry*, Tax Commissioner of Commonwealth of Massachusetts, 253 U. S. 12, 16, the United States Supreme Court said:

"In *Fidelity & Columbia Trust Company v. Louisville*, 245 U. S. 54, we held that a bank deposit of a resident of Kentucky in the bank of another State, where it was taxed, might be taxed as a credit belonging to the resident of Kentucky. In that case *Union Refrigerator Transit Co. v. Kentucky*, supra, was distinguished, and the principle was

affirmed that the State of the owner's domicile might tax the credits of a resident although evidenced by debts due from residents of another State. This is the general rule recognized in the maxim '*mobilia sequuntur personam*,' and justifying, except under exceptional circumstances, the taxation of credits and beneficial interest in property at the domicile of the owner."

In the case of *Citizens National Bank of Cincinnati v. Burr*, 257 U. S. 99, the United States Supreme Court held that a membership in the New York Stock Exchange held by a resident of Ohio was a property right, intangible in its nature, and that whether it was subject to taxation by Ohio taxing laws was a question of State law, determinable by [fol. 13] the State Court. In that case the Court said:

"Exemption from double taxation by one and the same State is not guaranteed by the Fourteenth Amendment (*St. Louis Southwestern Ry. Co. v. Arkansas*, 235 U. S. 350, 367-368); much less is taxation by two States upon identical or closely related property interests falling within the jurisdiction of both, forbidden. *Kidd v. Alabama*, 188 U. S. 730, 732; *Hawley v. Malden*, 232 U. S. 1, 13; *Fidelity & Columbia Trust Co. v. Louisville*, 245 U. S. 54, 58."

It is apparent that intangible personal property which has acquired a business situs in a State other than that of the owner, may be taxed both in the State where it has acquired a business situs and in the State of residence of the owner. The proofs established that the company pays no personal property tax in the State of New York, and is now seeking to escape taxation in the State of New Jersey.

The Board concludes that appellant is subject to taxation upon its capital stock and accumulated surplus in the State of New Jersey.

The company's reserve for unearned premiums cannot be deducted as a liability from its capital and accumulated surplus. In *Inhabitants of the City of Trenton v. Standard Fire Insurance Co. of New Jersey*, 77 N. J. L. 757; 73 A. 606, the Court of Errors and Appeals held that the reserve for unearned premiums is not exempt from taxation and cannot be deducted from the gross assets to ascertain the capital and accumulated surplus. The Court said:

[fol. 14] "This description is more applicable to an asset of the company set apart on its books to an amount equal to the cancellation value of its policies than it is to define a liability or debt. The fund is in the possession and control of the company, is invested by it in interest-bearing securities, and the profits yielded are substantial, and inure to the corporation. It seems not to be held on any trust, nor is it chargeable with any liability, other than that with which the capital and surplus are charged. It is a part of the surplus reserved from dividends. It may never be called upon to provide for the reinsurance of the company's risks or pay losses. * * *

"The question arises, then, should the reserve fund be counted as a liability? In the case of *People's Fire Ins. Co. v. Parker, Receiver*, 34 N. J. Law, 479, affirmed 35 N. J. Law, 575, it was held by this court that the term 'accumulated surplus', in its application to stock companies, is well understood to refer to the fund they have in excess of their capital and liabilities, and that the word 'liabilities' there used means fixed liabilities, not contingent, citing *State v. Utter*, 34 N. J. Law, 493. An assessment, levied against the unearned premiums as a part of the accumulated surplus of the company, was in that case affirmed. The liabilities and losses upon policies issued and unexpired is not a fixed and definite liability, but merely contingent, and as such it should not be deducted from the gross assets in order to ascertain the capital stock and accumulated surplus."

The appellant claims that the sum of \$71,765.65, set aside as a reserve for Federal taxes, is deductible from the assets [fol. 15] in determining the amount of capital stock and accumulated surplus. The City claims that this is not a debt and should not be deducted. In ascertaining the amount of the capital stock and accumulated surplus, it is necessary to deduct from the assets, not only debts but also liabilities. While a tax is not a debt, it is a fixed liability and should therefore be deducted.

Appellant's claim for deduction of \$119,109.72, representing agency balances over ninety days old, cannot be allowed, as this item represents neither debts nor liabilities. It is carried on the books of the company as an asset.

Appellant claims that the portion of its capital and accumulated surplus, representing cash on hand or on deposit, in the sum of \$532,784.54, is exempt from assessment, by virtue of Chapter 165, Laws of 1933.

If cash on hand or on deposit owned by an individual taxpayer is exempt from taxation, appellant is entitled to deduct it from its capital stock paid in and accumulated surplus, as corporations which are taxable upon the amount of capital stock paid in and accumulated surplus are entitled to deduct therefrom the securities (or property) which are exempt in the hands of individuals. *Newark City Bank v. Assessor of the 4th Ward of the City of Newark*, 30 N. J. L. 13. It therefore becomes necessary to determine whether the statute exempts the cash and deposits in bank of an individual taxpayer.

Chapter 165 of the Laws of 1933, which is an amendment to Section 203 of the General Tax Act of 1918, provides for the exemption of—

“Cash on hand or on deposit and loans on collateral of savings banks, mutual savings banks and institutions for savings organized under the laws of this State.”

[fol. 16] The statute is ambiguous and is susceptible to two constructions,—one that cash on hand or on deposit owned by anyone is exempt, and that loans on collateral of savings banks, mutual savings banks and institutions for savings are exempt. The other construction is that cash on hand or on deposit in the various institutions mentioned in the Act, or cash of the institutions on deposit and loans on their collateral are exempt, in which case the exemption is limited to the institutions mentioned in the Act. If the latter construction be accepted,—that only cash on hand of the various institutions mentioned in the Act, and their deposits, are exempt, then the Act would be unconstitutional. *Tippett v. McGrath*, Col., 70 N. J. L. 110; 56 A. 134; affirmed 71 N. J. L. 338; 59 A. 1118; *Essex County Park Commission v. Town of West Orange*, 77 N. J. L. 575; 73 A. 511.

Where an Act is susceptible to two constructions,—one making the Act constitutional and the other making it unconstitutional,—the courts have held that the construction which makes the Act constitutional must be accepted, for the reason that it must be inferred that the Legislature

intended to pass a constitutional act. State (Fidelity Trust Co.) v. Vogt, 66 N. J. L. 86; 48 A. 580; Commercial Trust Co. of N. J. v. Hudson County Board of Taxation, 86 N. J. L. 424; 92 A. 263. Following this construction, it is necessary to hold that cash on hand or on deposit is exempt, without regard to ownership.

After allowing the items for which the company is entitled to either deduction or exemption, a taxable capital and accumulated surplus remains, in excess of the assessment as made.

For the reasons stated, the appeal is dismissed.

[fol. 17] BEFORE STATE BOARD OF TAX APPEALS

In the Matter of Appeal of NEWARK FIRE INSURANCE Co.
from the Assessment of Property in City of Newark,
County of Essex for the Year 1935

JUDGMENT—Filed July 7, 1936

An appeal in writing having been filed with the State Board of Tax Appeals, duly verified according to the rules of practice prescribed by said Board, by Newark Fire Insurance Co. in which it is alleged that an injustice has been done the said complainant by the assessment of certain property for taxation for the year 1935, located at City of Newark in the County of Essex consisting of personal property consisting of stocks, bonds, other securities and accounts receivable, and that said property is assessed higher than the true value thereof;

After hearing evidence produced on the part of said complainant, and the said respondent, and the argument of Arthur T. Vanderbilt, Attorney for the complainant, and John A. Matthews, Attorney for the City of Newark and after considering the same, it is on this seventh day of July nineteen hundred and thirty-six, at a session of the State Board of Tax Appeals, ordered, adjudged and decreed, [fol. 18] under and by virtue of the authority conferred by law, that the assessment of \$1,069,000 on personalty, levied for the year 1935 on the above described property, be affirmed and the appeal therefrom dismissed.

BEFORE STATE BOARD OF TAX APPEALS

44532

NEWARK FIRE INS. Co., Petitioner,

vs.

CITY OF NEWARK, Co. OF ESSEX, Respondent

DOCKET ENTRIES

Assessment of 1935

Property: Personalty

Amount, \$1,069,000. Judgment, \$—

L. L.

B. B.

P. 1 069,000 P. .

1935.

Dec. 14. Petition filed.

1936.

March 31. Hearing fixed for April 28th at Trenton and
notice sent.

April 28. Case heard. Briefs to be filed.

July 7. Memorandum filed.

“ “ Judgment entered, dismissing appeal.

[fol. 19] BEFORE STATE BOARD OF TAX APPEALS

MINUTES

State House, Trenton, New Jersey

Tuesday, March 31, 1936.

The Board met at 10:30 A. M. on the above date.

Present, President Weaver, Commissioners Compton,
Margernum, Parkinson and Smith.

The Board fixed the following dates for hearing appeals:

Tuesday, April 28th: State House, Trenton, 5 Essex Co.
cases. (Newark.)

State House, Trenton, New Jersey

Tuesday, April 28, 1936.

The Board met at 10:30 A. M., Advanced Time, on the above date.

Present, President Weaver, Commissioners Compton, Margerum, Parkinson and Smith.

The following calendar of appeals was called:

4. Newark Fire Insurance Company vs. City of Newark. Case heard, Mr. Arthur T. Vanderbilt appearing on behalf of the petitioner and Mr. John A. Matthews, Special Counsel, appearing on behalf of the City of Newark. The Board heard the testimony of Robert C. Radcliffe on behalf of the petitioner, and reserved decision pending the filing of briefs.

[fol. 20] State House, Trenton, New Jersey

Tuesday, July 7, 1936.

The Board met at 10:30 A. M. on the above date for the purpose of organization, as prescribed by Rule 1 of its Rules of Practice.

Present, President Weaver, Commissioners Compton, Margerum, Parkinson, Smith, Berg and Moore.

President Weaver, Commissioners Margerum, Compton, Parkinson and Smith took up for consideration the appeal of Newark Fire Insurance Co. vs. City of Newark, heard on April Twenty-eighth at Trenton, and after considering the evidence produced ordered that the assessment of \$1,069,000, levied for the year 1935 on personal property of the petitioner, be affirmed and the appeal therefrom dismissed.

A memorandum was filed in this case, setting forth the grounds for the conclusions reached.

[fol. 21] BEFORE STATE BOARD OF TAX APPEALS

CERTIFICATE OF SECRETARY

I, Chas. E. Cook, Secretary of the State Board of Tax Appeals, do hereby certify, that the foregoing are true copies of the petition, judgment and proceedings in the matter of the appeal of Newark Fire Insurance Company, from the assessment of property in the City of Newark, County of Essex, for the year 1935, as the same are taken from and compared with the originals filed in the office of the State Board of Tax Appeals, on the fourteenth day of December and other dates, A. D. 1935 and 1936, and now remaining on file and of record therein.

In Testimony Whereof, I have hereunto set my hand and affixed the official seal of the Board, at Trenton, this nineteenth day of November A. D. 1937.

Chas. E. Cook, Secretary. (Seal)

[fol. 22] BEFORE STATE BOARD OF TAX APPEALS

[Title omitted]

STIPULATION AS TO FACTS

It is hereby stipulated and agreed by and between Arthur T. Vanderbilt, attorney of appellant Newark Fire Insurance Company, and John A. Matthews, attorney of respondent City of Newark, that the following agreed facts be incorporated in the record:

(a) The following figures have been agreed upon. In the first column appears the designation of what the fund represents; opposite each designation appearing the amount of the fund in question:

1. Capital stock	\$2,000,000.00
2. Surplus (as set forth in the books of the company)	2,982,940.29
3. Reserve for unearned premiums	3,001,623.46
4. Reserve for taxes	71,765.65
5. Reserve for contingencies	68,915.35
6. Reserve for reinsurance	4,228.36
7. Agency balances over 90 days old	119,109.72
8. Furniture and fixtures (in Newark office)	1,500.00
Total	\$8,250,082.83

[fol. 23] (b) It is further stipulated that the appellant is entitled to the following deductions:

1. Assessed value of real estate	\$175,600.00
2. Mortgage loans on real estate	136,188.17
3. Stocks of corporations (exempted by the Tax Act)	1,285,780.00
4. United States Government securities (exempted by the Tax Act)	3,103,173.00
5. Miscellaneous bonds secured by mortgages (exempted by the Tax Act)	37,080.00
Total	<u>\$4,737,821.17</u>

(c) It is further stipulated that appellant had cash on hand or on deposit as of October 1, 1934 in the sum of \$532,784.54, of which amount the sum of \$6,425.32 was on October 1, 1934 deposited in banks located in the State of New Jersey. The balance of \$526,359.22 represents either cash on hand at the company's main office at 150 William Street, New York City, or on deposit in banks in the City of New York or banks elsewhere outside of the State of New Jersey.

(d) It is further stipulated and agreed that appellant, Newark Fire Insurance Company, is a corporation organized under the laws of the State of New Jersey. Its registered office is located at 41 Clinton Street, Newark, New Jersey. For the last six years, appellant's main office has been located at 150 William Street, New York City. All of the books of the company are located in its office in New York City, with the exception of those books required by law to be kept within the State of New Jersey. Its executive officers and its executive office are located at 150 William Street, New York City. The general accounts of the company are kept in the office in New York City. The general accounting, underwriting and executive offices of the company are all located at the main office at 150 William Street, New York City. All cash and securities of the company are located there or in banks in that City or in other banks outside of the State of New Jersey, with the exception of the sum of \$6,425.32 on deposit in New Jersey banks. All of the general affairs of the company are conducted at the main office in New York City and have been so conducted there since appellant moved its main office from Newark six years ago.

The appellant maintains an office in the City of Newark at 41 Clinton Street. The only business that is carried on in the Newark office is a local or regional claim and underwriting department for the Counties of Essex, Union, Bergen and Hudson. All reports of business written and claims adjusted here, however, are sent to the main office of the company at 150 William Street, New York City. There is no executive officer at the Newark office.

All of the general affairs of the company are conducted by the executive officers who are all located at the main office at 150 William Street, New York City.

Arthur T. Vanderbilt, Attorney of Appellant, Newark Fire Insurance Company. John A. Matthews, Attorney of Respondent, City of Newark.

[fol. 25] IN SUPREME COURT OF NEW JERSEY

[Title omitted]

REASONS FOR SETTING ASIDE JUDGMENT—Filed November 24, 1936

Prosecutor assigns the following reasons for setting aside the judgment of the State Board of Tax Appeals brought up by this writ of certiorari:

1. The State Board of Tax Appeals erred in holding that prosecutor is subject to taxation in the City of Newark.
2. The State Board of Tax Appeals erred in holding that prosecutor is subject to taxation in the State of New Jersey.
3. The State Board of Tax Appeals erred in holding that prosecutor's reserve for unearned premiums constitutes part of prosecutor's capital and accumulated surplus.
4. The State Board of Tax Appeals erred in holding that prosecutor's reserve for unearned premiums cannot be deducted as a liability from prosecutor's capital and accumulated surplus.

[fol. 26] 5. The prosecutor is not taxable in the State of New Jersey because the business situs of prosecutor is in the State of New York and not within the State of New Jersey.

6. The prosecutor's reserve for unearned premiums is a liability and should therefore not be included in computing its capital and accumulated surplus.

7. The judgment of the State Board of Tax Appeals is in divers other respects illegal, unjust, oppressive and contrary to law.

Arthur T. Vanderbilt, Attorney of Prosecutor.

Service of a copy of the within Reasons is hereby acknowledged this 24th day of November, 1936.

Frank A. Boettner, Attorney of Defendant, City of Newark.

Service of a copy of the within Reasons is hereby acknowledged this 24th day of November, 1936.

Charles E. Cook, Secretary, State Board of Tax Appeals.

[fol. 27] BEFORE STATE BOARD OF TAX APPEALS

3 [Title omitted]

Statement of Evidence

Transcript of testimony taken in the above entitled matter before the State Board of Tax Appeals at the State House, Trenton, New Jersey on Tuesday, April 28th, 1936.

APPEARANCES

Arthur T. Vanderbilt, Esq., for the Petitioner.

Frank A. Boettner, Esq., by John A. Matthews, Esq., for the Respondent.

Mr. Vanderbilt: If the Commissioner please, Mr. Matthews and I have stipulated most of the facts and I only desire to call Mr. Ratcliffe on one point, the question of the unearned premium reserve. With your permission I will mark the stipulation as an Exhibit.

President Weaver: Is there any objection? Oh, this is a stipulation?

Mr. Vanderbilt: It has been signed, your Honor.

President Weaver: It may be marked.

Stipulation marked Exhibit p-1.

[fol. 28] ROBERT C. RATCLIFFE, sworn for the petitioner.

Direct examination.

By Mr. Vanderbilt:

Q. Mr. Ratcliffe, what is your position with the Newark Fire Insurance Company?

A. Treasurer.

Q. Will you explain to the Commissioners what is meant by the reserve for unearned premiums set up in the statement at \$3,001,623.46?

A. Under the terms of all policy contracts issued by the company, the assured has a right to cancel that policy. The premiums, of course, are payable in advance for a term of say, one, three or five years or an indeterminate term. The position of the State authorities, this being a Statutory requirement in all States is that the company must maintain a liability for the so-called unearned premium reserve, which would permit the company to cancel all its business on a pro rata basis under the terms of its policies. For the purpose of convenience, the State Department allows this reserve to be equated so that the computation can be made easier and a little bit more uniform. The theory being that all premiums written; for instance, one year premiums written in the year 1935, some might be written January 1, some might be written December 31, and the average term of those policies issued during the year is equated at July 1, on the theory they would average that date. The requirement of the State Department says then when we file our statements as of December 31, for instance on the one year business written in the year 1935, only six months of that has been earned. In other words, the six months from July 1, to December 31, and so the requirement of the State is that we shall maintain a reserve of 50% of those one year [fol. 29] writings. Similarly on three year business, at the end of December 31, for the first year we would only have earned six months out of the three years or one-sixth and the State Department insists that we shall maintain a reserve, a liability for five-sixths of that policy; five-sixths of that premium; five-sixths of the premium on all three year policies. The Company has no option on this reserve. It is a mandatory requirement. The companies are subject to departmental examination. In the case of the New

Jersey the department examines us every two years and when the department examiners come in, I should say that the majority of the time, or a large portion of the time they consume on the audit is actually consumed on verification of that unearned premium reserve. The liability is a very definite one, mandatory.

Q. Each assured has the right to obtain back the premium reserve on his particular policy or policies?

A. Yes, sir. He can surrender the policy and cancellation and demand return of the premium.

Q. As very often happens the company may desire to relieve itself of liability in a given State or territory and in that event, that premium reserve is used for the purpose of affecting re-insuring of the outstanding liabilities?

A. Yes.

Q. What use is made of the premium reserve for the protection of policy holders in the case of liquidation?

A. In the case of liquidation, the reserve there would be used for re-insuring.

President Weaver: Would that also be used for short rating of policies?

The Witness: The fund would be sufficient to take care of the short rate.

[fol. 30] Q. That is the purpose of the unearned premium reserve, is to short rate the policy insofar as individual policy holders are concerned?

A. It virtually puts upon cancellation the pro rata basis.

Q. The purpose of the unearned premium reserve required by the Statute of every State, so far as the individual policy holder is concerned is to provide a fund from which he may obtain back his unearned premium on his policy in the event he desires to cancel it or in the event the company desires to cancel the policy on its part?

A. Yes, sir.

Q. And from the standpoint of the department of Banking and Insurance, it is a fund to be used for the re-insuring of the business, the outstanding business of the company, if the commissioner determines that the company is in an unsafe condition?

A. Yes, sir.

Q. In either event, it is a fixed liability for the benefit of policy holders as against the company?

A. Yes, sir.

Q. And has your unearned premium reserve been verified by the department of banking and insurance as of any date prior to October 1, 1934?

A. The last departmental examination, examined our statement as of December 31, 1932.

Q. That is ten months prior to that. They are now being audited as of December 31, 1935. They just came in this morning.

Mr. Vanderbilt: We have no objection to offering the one exhibit from the commissioner's office, and to submit to the Board the other one as soon as it is ready.

Q. How long will it take to get the new one ready?

A. We presume, they will be there six or eight weeks, [fol. 31] and then their report will take one month.

President Weaver: If that proof is too long, we will take the previous one for the purpose of comparison and whatever action the commissioner may have taken with respect to certain items.

Q. And in setting up your unearned premium reserve, do you conform to the requirements and ruling of the Department of Banking and Insurance of the State of New Jersey?

A. Yes, sir.

President Weaver: There is no doubt this is a New Jersey corporation, organized under the insurance act?

Mr. Vanderbilt: That is conceded, Commissioner. It has its registered office at 41 Clinton Street, Newark, which is one of the Royal group and has its executive offices and as the stipulation says, the only business done in the Newark office is the local business of three or four counties locally situated.

Cross-examination.

By Mr. Matthews:

Q. The only tax you pay in New York is the franchise tax based upon premiums?

A. Yes.

Q. You don't pay any personal tax in New York?

A. No.

Mr. Matthews: That is all.

President Weaver: Mr. Vanderbilt, is there any question here raised as to where the securities may be located?

Mr. Vanderbilt: That is covered in the stipulation. There is \$1,500 worth of office furniture and fixtures in the Newark [fol. 32] office, and accounts in New Jersey banks of \$6,425.32 and securities are kept in New York.

President Weaver: Just so you have covered it.

Mr. Vanderbilt: May we follow the same course.

President Weaver: Same course.

Mr. Vanderbilt: I have my brief ready and I will serve it on counsel for the Respondent.

President Weaver: He may reply in ten days.

Mr. Matthews: That is ganging up on the Respondent's briefs, lady and gentlemen of the Board, but I will do my best.

The hearing then adjourned.

[fol. 33] STENOGRAPHER'S CERTIFICATE.

I, John F. Trainor, the stenographer designated by the State Board of Tax Appeals to report stenographically the evidence given before said Board upon the hearing of the appeal of Newark Fire Insurance Company, from the assessment of taxes made by the City of Newark, for the year 1935, do hereby certify that the foregoing is a true and correct transcript of the evidence given before said Board at the hearing on Tuesday, April twenty-eighth, 1936.

In witness whereof I have hereunto set my hand and seal this sixth day of October, 1936.

John F. Trainor. (Seal.)

SECRETARY'S CERTIFICATE

I, Chas. E. Cook, Secretary of the State Board of Tax Appeals, do hereby certify and send to the Justices of the Supreme Court the foregoing transcript, as a true and correct transcript of the evidence given before said Board upon the hearing of the appeal of Newark Fire Insurance Company, from the assessment of taxes made by the City of Newark, for the year 1935, said evidence having been sub-

mitted at the hearing on Tuesday, April twenty-eighth, 1936.

In witness whereof I have bereunto set my hand and affixed the official seal of the Board, at Trenton, this sixth day of October, 1936.

Chas. E. Cook. (Seal.)

[fol. 34] IN SUPREME COURT OF NEW JERSEY, MAY TERM,
1937

No. 208

NEWARK FIRE INSURANCE COMPANY, Prosecutor,

vs.

STATE BOARD OF TAX APPEALS and CITY OF NEWARK, a Municipal Corporation of the State of New Jersey, Respondents

Submitted May —, 1937. Decided August 31, 1937

On certiorari

Before Justices Bodine, Heher and Perskie.

For prosecutor, Arthur T. Varderbilt.

For respondents, Frank A. Boettner, John A. Matthews.

OPINION OF THE COURT—Filed September 1, 1937

The opinion of the court was delivered by

PERSKIE, J.:

The question before us concerns the validity of the personal property assessment made by the City of Newark on October 1, 1934, for the year 1935 against prosecutor. The assessment was made in accordance with our general tax act. P. L. 1918, chap. 307, p. 858, as amended,

[fol. 35] Prosecutor is a general fire insurance company organized under the laws of this state with its registered office at 31 Clinton Street, in the City of Newark. For six years prior to the assessment its main and executive offices have been and now are at 150 William Street, in the City

of New York. Prosecutor's general business is conducted in New York, and all the books of the company, except those required by law to be kept at its registered office in New Jersey, are located there. Although a small amount of cash and some few securities are kept in New Jersey so that business may be done here, the great majority of these items is either in the New York offices or in banks in that State. The business conducted at the Newark office is confined to local regional underwriting and the adjustment of claims arising therefrom. Reports on such business are sent to the main office in New York. The record also discloses that prosecutor pays no personal property tax in New York, and, for aught that appears, no such tax is exacted by that State.

The State Board of Tax Appeals affirmed the assessment as made by the taxing authorities of Newark thereby assessing the intangible property owned by prosecutor. This court granted certiorari and prosecutor argues that the assessment as made should be reduced because (1) New Jersey has no jurisdiction to tax the intangibles; and (2) because it was error to include the item of unearned premium reserve as a taxable asset.

First. As to jurisdiction to tax prosecutor in this State. This question must, in light of the proofs, be considered upon the inescapable premise that prosecutor had its business situs as of October 1, 1934, and still has it, in New [fol. 36] York; that the securities, the personalty involved, have become an integral part of its business situs in New York; but that prosecutor pays no personal property tax to the State of New York.

It is fundamental that jurisdiction to tax depends primarily on the type of tax sought to be exacted and the property that is subject to the tax. Here the tax, under the act, is a personal property tax. The property subject to the tax constitutes securities which represent paid in capital stock and accumulated surplus of the company. Such securities are clearly intangibles. It is well settled that intangible personalty is taxable at the domicile of the owner. *Kirtland v. Hotchkiss*, 100 U. S. 491; *Blodgett v. Silberman*, 277 U. S. 1; *Farmers Loan & Trust Co. v. Minnesota*, 280 U. S. 204. That principle finds its support in the legal maxim *mobilia sequuntur personam*. The use of this maxim like the use of most other maxims in juris-

prudence, is not the solution of the problem; it is merely a formal and unexplanatory statement of a legal conclusion. Cf. 9 Harvard Law Review 13; 8 Am. L. Rev. 519. Thus frequently its use is not very helpful. But since contrary to the case of tangibles, intangibles have no actual situs, are not physically under the definite control of any one jurisdiction, the rule, as embraced in the maxim developed and is justified even to this day as a rule of convenience. Convenience, however, brings hardship. So it was not long before exceptions to the general rule as stated gradually found and worked themselves into the law. Thus it has been held that where intangible personal property became an integral part of a business carried on in a state other than that of the domicile of the owner of the intangibles, then that other state, the state wherein the intangibles [fol. 37] acquired a "business situs" had jurisdiction to levy a personal property tax upon these intangibles. *New Orleans v. Stempel*, 175 U. S. 309; *Metropolitan Life Ins. Co. of N. Y. v. New Orleans*, 205 U. S. 395; *Wheeling Steel Corp. v. Fox*, 298 U. S. 193; *Safe Deposit & Trust Co. v. Virginia*, 280 U. S. 588; *Farmers Loan & Trust Co. v. Minnesota*, 280 U. S. 204; *First National Bank of Boston v. Maine*, 284 U. S. 312; see, 76 A. L. R. 806. Conceding the application of this exception to the general rule, the problem soon arose as to whether, when the "business situs" theory did apply, the state of the domicile could still tax. The answer to that question is not free from serious doubt, a doubt which the Supreme Court of the United States has sounded notwithstanding its holding that the state of the domicile might tax even though the "business situs" theory applied. *Cream of Wheat Co. v. County of Grand Forks*, 253 U. S. 325. It is interesting to observe the growing tendency of this doubt. It manifests itself both prior to and subsequent to the holding in the *Cream of Wheat* case. For example, in the case of *Union Refrigerator Transit Co. v. Kentucky*, 199 U. S. 194, decided prior to the *Cream of Wheat* case, and in the case of *Frick v. Pennsylvania*, 268 U. S. 473 (overruled on other grounds) it was held that tangible property may be taxed only by one state; and again the court has held, since the *Cream of Wheat* case, that in the absence of the applicability of the "business situs" exception, only the state of the domicile might tax intangibles. *Farmers Loan & Trust Co. v. Minnesota*,

supra; *Baldwin v. Missouri*, 281 U. S. 586; *Beidler v. South Carolina Tax Commission*, 282 U. S. 1; *First National Bank of Boston v. Maine*, supra. In so holding the court was [fol. 38] very careful to point out, notwithstanding its holding in the *Cream of Wheat* case, that the question involving the right of the domiciliary state to tax when the "business situs" exception applied is an open one. Decision thereof has been expressly reserved. Cf. *Farmers Loan & Trust Co. v. Minnesota*, supra, at p. 213, and *First National Bank of Boston v. Maine*, supra, at p. 331. While this doubt has been cast by the highest court of our land, that body has never expressly overruled its decision in the *Cream of Wheat* case. Until such time as that case is reconsidered, we are bound by its holding that there is a sufficient interrelation between the state of the domicil and the intangibles which have acquired a business situs elsewhere to justify the imposition of a personal property tax by the former upon the latter.

Nor do we, by so deciding run afoul of the strong modern sentiment against multiple taxation as manifested by the United States Supreme Court. See *Farmers Loan & Trust Co. v. Minnesota*, supra, at p. 212; *First National Bank of Boston v. Maine*, supra, at pp. 326, 334. For, as has been pointed out, prosecutor pays no personal property tax in New York. Thus under the circumstances here exhibited multiple taxation is impossible. Prosecutor may not invoke the dictum that "the rule of immunity from taxation by more than one state . . . is broader than the application thus far made of it." *First National Bank of Boston v. Maine*, supra, at p. 326.

Second. As to the item of unearned premium reserve. We are aware of the fact that sound accounting practice may require this item to be booked as a liability. Nor are we unmindful of the many things that may be said in favor [fol. 39] of such a requirement. Modern statistical analyses available to companies in the position of prosecutor may and do compute to a very accurate degree just what part of such reserve will be expended each year. But companies control the fund so set up. They invest them and earn a return upon them. Because of these factors our sister states have divided upon the answer to this problem. See 13 A. L. R. 189, et seq. Our Court of Errors

and Appeals has taken the position that this item, at least for the purpose of taxation, should be considered an asset. *City of Trenton v. Standard Fire Ins. Co.*, 77 N. J. L. 575, 73 At. 606. Whether the reserve set up consists of exempt securities, and the exemption of the reserve fund as claimed would thus result in a double deduction is not made clear. But be that as it may, this court is bound by the decision in the case of *City of Trenton v. Standard Fire Ins. Co.*, supra.

Third. The parties stipulated before the Board that prosecutor had cash on hand or on deposit as of October 1, 1934 of \$532,784.54 of which amount the sum of \$6,425.52 was deposited in banks in New Jersey and the balance of \$526,359.22 represents cash on hand in either the New York office or on deposit in New York banks. The State Board determined that this item was exempt under P. L. 1933, chap. 165, p. 346. Respondent's argument that this determination is incorrect, if properly before us, is sound. Prosecutors cash on hand or on deposit as of October 1, 1934 was not exempt; it was taxable. *Newark v. State Board of Tax Appeals*, 118 N. J. L. 131, 191 At. 843. We are, of course, under section 11 of our Certiorari act (1 C. S. (1709-1910) pp. 402-406), obliged to "determine disputed questions of fact as well as of law—" But that, under the circumstances exhibited and generally stated, means disputes, as to facts or law or both, properly raised. Is the point properly before us? We think not. True, it was raised and disputed before the State Board of Tax Appeals; the latter passed judgment upon it. But it is also true that, save as to the argument made here upon the point, respondents permitted the judgment of the Board to stand unchallenged. It cannot now properly be heard to complain. The fact of the matter is that, notwithstanding its argument to the contrary, respondents conclude their brief with the submission "that the judgment of the State Board of Tax Appeals should be affirmed and the writ of certiorari dismissed."

The judgment of the State Board of Tax Appeals is, therefore, affirmed with costs.

(Reported in 118 N. J. L. 525, 193 Atl. 912.)

fol. 41] IN SUPREME COURT OF NEW JERSEY

[Title omitted]

NOTICE OF APPEAL AND GROUNDS OF APPEAL—Filed November 18, 1937

to James F. X. O'Brien, Esq., Attorney of Defendant City of Newark and Defendant State Board of Tax Appeals:

Take notice that the prosecutor appeals to the Court of Errors and Appeals in the last resort in all causes from the whole of the judgment of the Supreme Court entered in this cause on the following ground:

1. The Supreme Court erred in affirming the judgment of the State Board of Tax Appeals and in dismissing the writ of certiorari herein.

Arthur T. Vanderbilt, Attorney for and of Counsel with Prosecutor.

Dated October 28, 1937.

Sat below: Perskie, J., Heher, J., Bodine, J.

fol. 42] Service of a copy of the within notice and grounds of appeal is hereby acknowledged this 15th day of November, 1937.

James F. X. O'Brien, Attorney for Defendant, City of Newark. Chas. E. Cook, Secretary of Defendant, State Board of Tax Appeals.

fol. 43] IN COURT OF ERRORS AND APPEALS OF NEW JERSEY

NEWARK FIRE INSURANCE COMPANY, Appellant,

v.

STATE BOARD OF TAX APPEALS et al., Respondents

Submitted February 11, 1938. Decided April 29, 1938.

Appeal from the Supreme Court, Whose Opinion is Reported in 118 N. J. L. 525

For the appellant, Arthur T. Vanderbilt.

For the respondents, James F. X. O'Brien.

OPINION—Filed April 29, 1938

Per CURIAM:

The judgment under review herein should be affirmed, for the reasons expressed in the opinion delivered by Mr. Justice Perskie in the Supreme Court.

For affirmance as to first and third parts—The Chancellor, Chief Justice, Trenchard, Parker, Donges, Porter, Hetfield, Dear, Wells, Wolfskeil, Rafferty, Walker, JJ. 12.

For reversal as to second part—Walker, J., 1.

A true copy. Thomas A. Mathis, Clerk.

[File endorsement omitted.]

[fol. 44] IN COURT OF ERRORS AND APPEALS OF NEW JERSEY

NEWARK FIRE INSURANCE COMPANY, Prosecutor,

vs.

STATE BOARD OF TAX APPEALS and THE CITY OF NEWARK, a
Municipal Corporation of the State of New Jersey, Re-
spondents

On Appeal

ORDER OF AFFIRMANCE AND REMITTITUR TO SUPREME COURT
—Filed May 31, 1938

This cause having been duly submitted on briefs at the February term, 1938, of this court by Arthur T. Vanderbilt, of counsel for the prosecutor, and Andrew B. Crummy, of counsel for the respondent, City of Newark, and the court having considered the same, and finding no error in the record of proceedings in the Supreme Court,

It is, thereupon, on this 29th day of April, in the year of Our Lord One Thousand Nine Hundred and Thirty-eight, Ordered and Adjudged that the judgment of the Supreme Court reviewed by the appeal in this cause, be affirmed with costs; and that the record be remitted to the Supreme Court to be proceeded with in accordance with this judgment and the practice of said court.

On motion of Jno. A. Matthews, Special Counsel to City of Newark,

A True Copy. Thomas A. Mathis, Clerk.

[fols. 45-60] [File endorsement omitted.]

[fol. 61] IN SUPREME COURT OF THE UNITED STATES

[Title omitted]

PETITION FOR APPEAL FROM THE COURT OF ERRORS AND APPEALS OF THE STATE OF NEW JERSEY TO THE SUPREME COURT OF THE UNITED STATES—Filed October 8, 1938

Considering itself aggrieved by the final decision of the Court of Errors and Appeals of the State of New Jersey in the above entitled cause, petitioner, the Newark Fire Insurance Company, a corporation of the State of New Jersey, hereby prays that an appeal be allowed to the Supreme Court of the United States herein, and for an order fixing the amount of the bond thereon, and to that end respectfully shows:

1. Your petitioner is the prosecutor-appellant in the above entitled cause.

2. Petitioner states that it was on October 1, 1934 and now is a corporation organized under the laws of the State of New Jersey having its statutory registered office at 31 Clinton Street, in the City of Newark, where it maintains, however, only a local or regional claim underwriting department. Its main and executive offices are located at 150 William Street, in the City of New York, State of New York, the place of its business situs and commercial domicile, where all of the general business incident and necessary to the conduct of an insurance company is conducted, where all of its books are kept with the exception of those required by law to be kept within the State of New Jersey, and where its executive officers are located. All of its securities, cash and accounts receivable are located in New York or in banks outside of the State of New Jersey, with minor exceptions.

[fol. 62] 3. On October 1, 1934 the City of Newark assessed a personal property tax against the capital stock and accu-

culated surplus of the petitioner as of October 1, 1934, pursuant to Chapter 236 of the Laws of New Jersey of 1918, Sections 202, 301 and 307, now changed to Revised Statutes of New Jersey, Sections 54:4-1, 54:4-9 and 54:44-22. Petitioner appealed from these assessments to the Essex County Board of Taxation which rendered a judgment affirming the assessment. Petitioner thereupon appealed to the State Board of Tax Appeals of the State of New Jersey, which affirmed the decision of the County Board. The Supreme Court of New Jersey reviewed this decision by certiorari and affirmed it. Upon appeal to the Court of Errors and Appeals, the court of last resort in all causes in the State of New Jersey, this judgment of the Supreme Court was affirmed.

4. There is error in the final judgment and the record of the proceedings in this cause in the said Court of Errors and Appeals of the State of New Jersey whereby petitioner is aggrieved in that in the decision and judgment of the said Court there was drawn in question the validity of a statute of the State of New Jersey, namely, Chapter 236 of the Laws of New Jersey of 1918, Sections 202, 301 and 307, now changed. Revised Statutes of New Jersey, Sections 54:4-1, 54:4-9 and 54:4-22, which as construed and applied by that Court constituted a personal property tax by the State of New Jersey through the City of Newark upon the intangible personal property of a domestic corporation having a statutory registered office within the state but having its business situs or commercial domicile in the State of New York, on the ground of its being repugnant to and in contravention of the 14th Amendment of the Constitution of the [fol. 63] United States, and that the decision and judgment of the said Court was in favor of the validity of such statute.

5. Therefore, in accordance with Sec. 237(a) of the Judicial Code, and in accordance with the Rules of the Supreme Court of the United States, your petitioner respectfully shows this court that the case is one in which, under the legislation in force when the Act of January 31, 1928, was passed, to wit, under Sec. 237(a) of the Judicial Code, a review could be had in the Supreme Court of the United States on a writ of error, as a matter of right.

Wherefore petitioner prays for the allowance of an appeal from the aforesaid final judgment of the Court of Errors

and Appeals of the State of New Jersey to the Supreme Court of the United States in order that the decision and judgment of the Court of Errors and Appeals of the State of New Jersey may be examined and reversed, and further prays that a transcript of the record, proceedings and papers in this cause, duly authenticated by the Clerk of the Court of Errors and Appeals of the State of New Jersey, may be sent to the Supreme Court of the United States, as provided by law. The errors upon which petitioner claims to be entitled to an appeal are those hereinabove indicated and which are more fully set out in the Assignment of Errors filed herewith.

Dated August 19, 1938.

Arthur T. Vanderbilt, Attorney for Petitioner.

Application for allowance of the Appeal read to me this 22d day of August, 1938.

Louis D. Brandeis, Associate Justice.

A True Copy. Thomas A. Mathis, Clerk.

[fol. 64] The within petition is denied, solely for lack of jurisdiction.

Luther A. Campbell, C. & D. J. Ct. Errors and Appeals of N. J.

[File endorsement omitted.]

[fol. 65] IN SUPREME COURT OF THE UNITED STATES

[Title omitted]

ORDER ALLOWING APPEAL—Filed October 8, 1938

The prosecutor-appellant in the above entitled suit, having prayed for the allowance of an appeal in this cause to the Supreme Court of the United States from the judgment made and entered in the above entitled suit by the Court of Errors and Appeals of the State of New Jersey on the 31st day of May, 1938, and from each and every part thereof, and having presented and filed its petition for appeal, assignment of errors, prayer for reversal and statement as to jurisdiction, pursuant to the statutes and the rules of the

Supreme Court of the United States in such case made and provided:

It is now here ordered that an appeal be, and the same is hereby, allowed to the Supreme Court of the United States from the Court of Errors and Appeals of the State of New Jersey in the above entitled cause as provided by law, and it is further ordered that the clerk of the Court of Errors and Appeals of the State of New Jersey shall prepare and certify a transcript of the record, proceedings and judgment in this cause and transmit the same to the Supreme Court of the United States, so that he shall have the same in [fol. 66] said Court within forty days of this date.

And it is further ordered that security for costs on appeal be fixed in the sum of \$500.

Dated October 3, 1938.

Louis D. Brandeis, Associate Justice.

A True Copy. Thomas A. Mathis, Clerk.

[fol. 67] [File endorsement omitted.]

[fol. 68] IN SUPREME COURT OF THE UNITED STATES

[Title omitted]

ASSIGNMENT OF ERRORS—Filed October 8, 1938

The said Newark Fire Insurance Company assigns the following errors of record and proceedings in this cause:

1. The judgment of the Court of Errors and Appeals of the State of New Jersey in affirming the judgment of the New Jersey Supreme Court and in holding that the assessment levied by the City of Newark under Chapter 236 of the Laws of 1918, sections 202, 301 and 307 (now Revised Statutes of New Jersey, sections 54:4-1, 54:4-9 and 54:4-22) against the intangible personal property of petitioner for taxes for the year 1935 is a valid assessment was erroneous and illegal because the commercial domicile and business situs of the petitioner and of the property taxed on October 1, 1934 was located in the City of New York, beyond the jurisdiction of the taxing district. The construction and application of said sections of the statute by the Court of Errors and Appeals of the State of New Jersey subjecting

the intangible personal property of appellant to taxation by the City of Newark is repugnant to the 14th Amendment of the Constitution of the United States and deprives petitioner of its property without due process of law.

Wherefore, on account of the errors hereinbefore assigned, petitioner prays that the said judgment of the [fol. 69] Court of Errors and Appeals of the State of New Jersey dated the 31st day of May, 1938 in the above entitled cause ~~affirming the judgment of the New Jersey Supreme Court~~ may be reversed, set aside and for nothing holden.

Dated August 19, 1938.

Arthur T. Vanderbilt, Attorney for Appellant.

A True Copy. Thomas A. Mathis, Clerk.

[fol. 70] [File endorsement omitted.]

[fols. 71-76] Bond on appeal for \$500.00, approved and filed October 13, 1938, omitted in printing.

[fols. 77-78] Citation, in usual form, filed October 8, 1938, omitted in printing.

[fol. 79] Clerk's certificate to foregoing transcript omitted in printing.

[fol. 80] IN SUPREME COURT OF THE UNITED STATES

STATEMENT OF POINTS AND DESIGNATION OF RECORD—Filed
October 31, 1938

Comes now the appellant and adopts its assignments of error as its statements of points to be relied upon, and represents that the whole of the record, as filed, is necessary for the consideration of the case.

Dated October 28, 1938.

Arthur T. Vanderbilt, Counsel for Appellant.

[fol. 81] Service of the within Statement of Points and Designation of Record is hereby acknowledged upon the 28th day of October, 1938.

Special Counsel for Appellee, City of Newark
James F. X. O'Brien, Counsel for Appellee, City
of Newark. Chas. E. Cook, Sec. State Board of
Tax Appeals.

[fol. 82]

AFFIDAVIT

John Lee of full age, being duly sworn according to law upon his oath deposes and says:

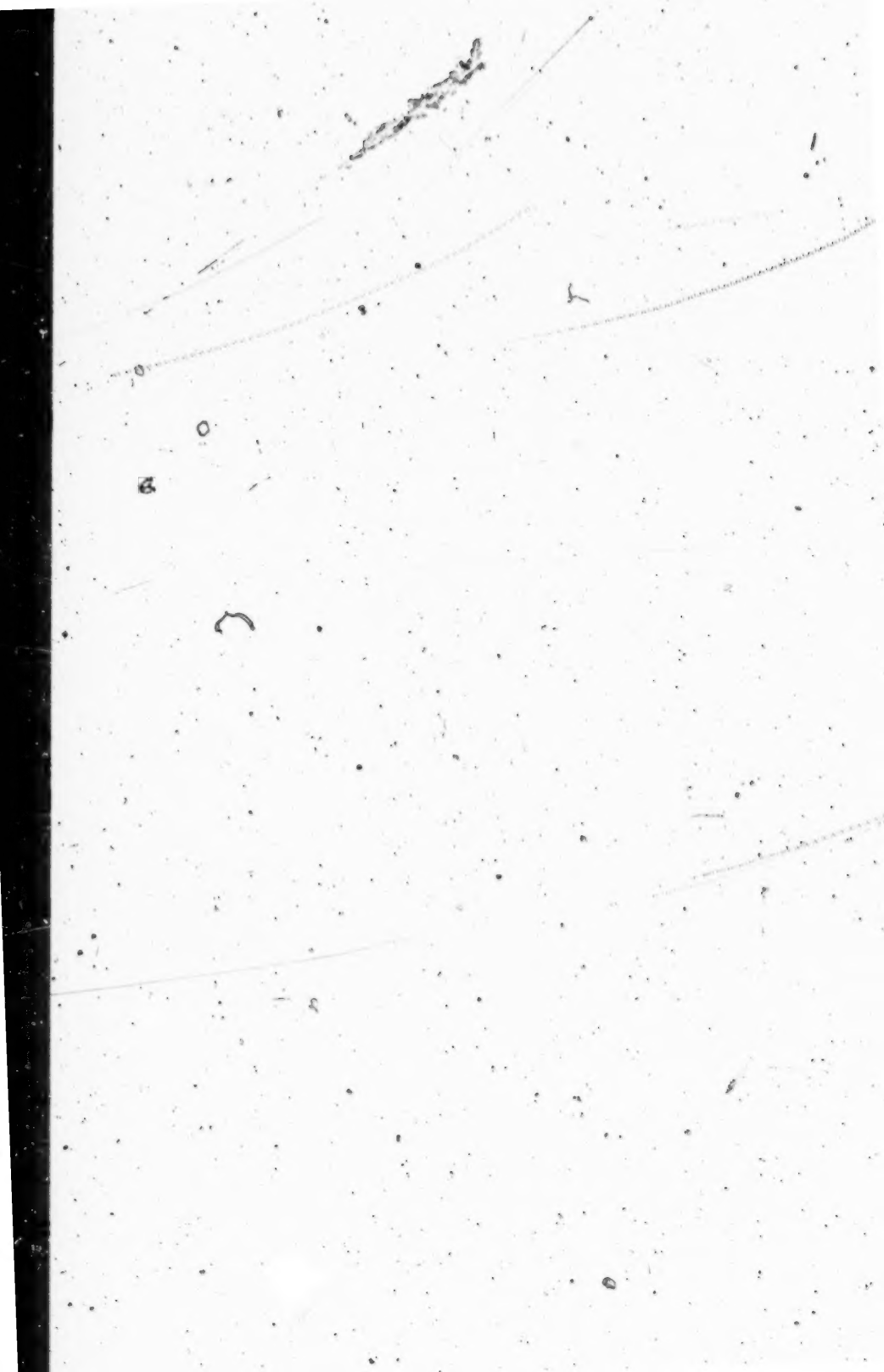
I am a clerk in the law office of Arthur T. Vanderbilt, counsel for appellant in this case. On October 29, 1938, between the hours of ten and eleven A. M. I served a copy of the Statement of Points and Designation of Record upon John A. Matthews, Special Counsel of Record for Appellee City of Newark, by handing a copy of same to Gertrude Kane, secretary, who was in charge of his office at 744 Broad Street, Newark, N. J.

John Lee.

Subscribed and sworn to before me this 29th day of October, 1938. Evelyn T. Adam, a Notary Public of New Jersey. (Seal.)

[fol. 83] [File endorsement omitted.]

Endorsed on cover: File No. 42,934. New Jersey Court of Errors and Appeals. Term No. 449. Newark Fire Insurance Company, appellant, vs. State Board of Tax Appeals and The City of Newark. Filed October 31, 1938. Term No. 449, O. T., 1938.



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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1938

No. 456

**UNIVERSAL INSURANCE COMPANY AND UNIVER-
SAL INDEMNITY INSURANCE COMPANY, APPEL-
LANTS,**

vs.

**STATE BOARD OF TAX APPEALS OF THE STATE
OF NEW JERSEY AND THE CITY OF NEWARK**

**APPEAL FROM THE COURT OF ERRORS AND APPEALS OF THE STATE
OF NEW JERSEY**

FILED NOVEMBER 2, 1938.



SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1938

No. 456

UNIVERSAL INSURANCE COMPANY AND UNIVER-
SAL INDEMNITY INSURANCE COMPANY, APPEL-
LANTS,

vs.

STATE BOARD OF TAX APPEALS OF THE STATE
OF NEW JERSEY AND THE CITY OF NEWARK

APPEAL FROM THE COURT OF ERRORS AND APPEALS OF THE STATE
OF NEW JERSEY

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[fol. 1] THE ESSEX COUNTY BOARD OF TAXATION

In the Matter of the Appeal of **UNIVERSAL INSURANCE COMPANY** from the Assessment of Property in The City of Newark, County of Essex, for the year 1935

JUDGMENT

An appeal in writing having been filed with the Essex County Board of Taxation, duly verified according to rules of practice prescribed by said Board, by Universal Insurance Company, 51 Clinton Street, Newark, New Jersey, in which it is alleged that an injustice has been done the said complainant by the assessment of its property for taxation for the year 1935, located at Newark in the County of Essex, consisting of personally located at 51 Clinton street.

After hearing evidence produced on the part of said complainant, and the argument of Jeremiah F. Hoover for the complainant, and John A. Matthews for the City of Newark and after considering the same, it is on this eighth day of November nineteen hundred and thirty-five, at a session of the Essex County Board of Taxation, Ordered, Adjudged and Decreed, under and by virtue of Chapter 120 of the Laws of 1906, that the assessment of \$500,000 be reduced to \$455,400.

[fol. 2] And it is Further Ordered, That this order be certified to the Collector of the City of Newark, County of Essex.

Max Drill, William F. Kearney, J. William Huegel,
Essex County Board of Taxation.

Attest: William P. Macksey, Secretary.

[fol. 3] IN SUPREME COURT OF NEW JERSEY

WRIT OF CERTIORARI

STATE OF NEW JERSEY, ss:

(L. S.)

The State of New Jersey to State Board of Tax Appeals of the State of New Jersey, Francis D. Weaver, President, George Compton, Mahlon R. Margerum, Thelma A. Parkinson, David R. Smith, Alex F. Berg and Hervey S. Moore, Members of the State Board of Tax Appeals; and City of Newark, County of Essex, Greeting:

We being willing, for certain reasons appearing by the affidavits presented on this application, to be certified of

a certain judgment rendered on July 28, 1936, by the State Board of Tax Appeals, upon the appeal of the Universal Insurance Company, from a judgment of the Essex County Board of Taxation entered on the 8th day of November, 1935, upon an assessment for taxation for the year 1935 made by the City of Newark, upon certain personal property of the Universal Insurance Company alleged to be located in the Taxing District of the City of Newark, County of Essex and State of New Jersey, and listed as personal property located at 31 Clinton street, Newark, N. J., to wit, the capital stock and accumulated surplus of the said company, Do Command You that you certify and send, under your seal, to our Justices of our Supreme Court of Judicature, at Trenton, on the 18th day of December, 1936, the said judgment of said State Board of Tax Appeals, filed July 28, 1936, together with all things touching and concerning the same, including all proceedings upon an application for re-hearing and the order denying same, as fully and completely as they remain before you, together with this, our writ; that we may cause to be done thereupon what [fol. 4] of right and justice and according to the laws of the State of New Jersey ought to be done.

Witness, Thomas J. Brogan, Esquire, Chief Justice of our Supreme Court, at Trenton, this 28th day of November in the year of our Lord, One Thousand Nine Hundred and Thirty-Six.

Fred L. Bloodgood, Clerk.

Child, Biker, Marsh & Shipman, Attorneys for Prosecutor.

ALLOCATUR

The within writ is allowed this 28th day of November, 1936.

Let it be sealed.

Charles W. Parker, S. C. J.

[fol. 5] IN SUPREME COURT OF NEW JERSEY

UNIVERSAL INSURANCE COMPANY, Prosecutor,

VS.

STATE BOARD OF TAX APPEALS OF THE STATE OF NEW JERSEY
and CITY OF NEWARK, Respondents

RETURN TO WRIT

On Certiorari

The State Board of Tax Appeals doth herewith send to the Supreme Court of the State of New Jersey the petition, judgment and proceedings in the matter of the appeal of Universal Insurance Company, from the assessment of property located in the City of Newark, for the year 1935, as within it is commanded, as by the transcript under the seal of said Board hereto annexed more fully appears.

State Board of Tax Appeals, by Chas. E. Cook.
(Seal.)

[fol. 6] BEFORE STATE BOARD OF TAX APPEALS

In the Matter of the Application of UNIVERSAL INSURANCE COMPANY, a Corporation of the State of New Jersey, for the Cancellation of the Tax Assessment for the year 1935 on its Property Alleged to be Situate in the Taxing District of the City of Newark, County of Essex and State of New Jersey, and on the Full Amount of Its Capital Stock Paid in and Accumulated Surplus

PETITION—Filed December 14, 1935

To the State Board of Tax Appeals:

Your petitioner, Universal Insurance Company, a fire insurance company, incorporated under the laws of the State of New Jersey, and having its registered office in New Jersey at 810 Broad street, in the City of Newark, County of Essex and State of New Jersey, respectfully shows:

That petitioner is taxable under Chapter 236, Section 307 of the Laws of 1918, as a fire insurance company, in the taxing district where its office is situate, upon the full

amount of its capital stock paid in and accumulated surplus; that the main office of petitioner was on October 1, 1934 and now is situated at 111 John street, in the City of New York, County and State of New York, and not in the [fol. 7] taxing district of the City of Newark, Essex County, New Jersey; that petitioner did maintain on October 1, 1934, a local underwriting department at No. 51 Clinton street, in the City of Newark, Essex County, New Jersey, but the business conducted in said local office was subject to confirmation at the main office of your petitioner in New York City.

Petitioner alleges that all of its personal property, constituting the full amount of its capital stock paid in and accumulated surplus had on October 1, 1934, and now has its business situs at the main business office of petitioner in the City of New York and not within the taxing district of the City of Newark. The executive offices and officers were located there, all the books of the company were kept there and all insurance contracts written by the underwriting department in New Jersey must be confirmed at the main office. All accounts and bills are collected and paid from the main office, including salaries. All the bank accounts of the company were kept in New York banks, with the exception of one bank account kept in the National Newark & Essex Banking Company in the City of Newark; all securities are kept in New York City, with the exception of securities of the par value of \$60,000.00 in the form of United States Government bonds which were on October 1, 1934 and now are on deposit with the Commissioner of Banking and Insurance of the State of New Jersey, in order that the company might transact business in New Jersey.

Petitioner has been assessed for the purposes of taxation for the year 1935, upon property alleged to be located at 51 Clinton street, Newark, Essex County, New Jersey, and upon the full amount of its capital stock paid in and accumulated surplus, in the sum of \$500,000.00, at which assessment petitioner is aggrieved, because petitioner can be assessed only in the taxing district where its main office is situated, and the main office of the petitioner was not situated in the taxing district of the City of Newark on October 1, 1934 and because all of the personal property of the petitioner constituting and making up the full amount of its capital stock paid in and accumulated surplus as of October 1, 1934, had its business situs at the main office of the com-

pany, 111 John street, New York City, and not within the taxing district of the City of Newark. Said assessment should, therefore, be cancelled.

Petitioner is further aggrieved because the said assessment is in excess of the true value of the company's capital stock paid in and accumulated surplus, for the following reasons:

First. In arriving at the full amount of the capital stock paid in and accumulated surplus, the tax assessor included the unearned premium reserve as a taxable asset, whereas, the said unearned premium reserve should be deducted as a non-taxable liability.

Second. The said assessor likewise included as a taxable asset in determining the capital stock paid in and accumulated surplus, certain agency balances due to the company from its agents located in other states than the State of New Jersey, upon all of which balances and accounts taxes have been actually assessed and paid within twelve months next before October 1, 1934.

Third. The said assessor included as a taxable asset in determining the capital stock paid in and accumulated surplus [fol. 9] plus, the amount of cash on hand and in banks which the company had in its possession on October 1, 1934, which said cash was specifically exempted by Section 203 of Article 2, Paragraph 9, of Chapter 165 of the Laws of 1933.

Petitioner, therefore, alleges that, if all said proper and legal exemptions and deductions had been allowed, that the company would have had no legally taxable capital stock paid in and accumulated surplus.

That an appeal from the said assessment has been filed with the Essex County Board of Taxation, and upon the hearing of said appeal the attorney appearing for petitioner allegedly agreed with the attorney for the City of Newark, without the knowledge or consent of petitioner, to an assessment in the amount of \$455,400.00, and that judgment be entered for that amount; that your petitioner, upon learning of such alleged agreement, immediately, through its present counsel and upon notice to the City of Newark, made application to the said Essex County Board of Taxation for leave to withdraw the alleged agreement and any judgment entered thereon, and to proceed with the appeal, petitioner at all times having contended that the business situs of the

property was not within the jurisdiction of the City of Newark; that the said application of petitioner was denied and the appeal was disposed of as follows:

The assessment of \$500,000.00 be reduced to \$455,400.00.

Petitioner, therefore, prays that for the reasons herein set forth, the entire assessment made against the company's [fol. 10] property and its capital stock paid in and accumulated surplus, be cancelled.

Dated December 11, 1935.

Universal Insurance Company, by Harry Bird, Vice-President. (Seal.)

Duly sworn to by Harry Bird. Jurat omitted in printing.

[fol. 11] STATE OF NEW JERSEY,
County of Essex, ss:

Edward G. Slingerland, being duly sworn according to law, on his oath says that he served a copy of the above petition and affidavit on Frank A. Beettner (Attorney) of City of Newark (name of taxing district), personally, this 12th day of December, 1935.

Edward G. Slingerland.

Sworn and subscribed before me, this 12th day of December, 1935. Samuel P. Watson, Notary Public of New Jersey. (Seal.)

STATE OF NEW JERSEY,
County of Essex, ss:

Edward G. Slingerland, being duly sworn according to law, on his oath says that he served a copy of the above petition and affidavit on William P. Macksey (Secretary) of the Essex County Board of Taxation, personally, this 12th day of December, 1935.

Edward G. Slingerland.

Sworn and subscribed before me, this 12th day of December, 1935. Samuel P. Watson, Notary Public of New Jersey. (Seal.)

[fol. 12]

EXHIBIT P. 1

STATE BOARD OF TAX APPEALS

In the Matter of the Application of **UNIVERSAL INSURANCE COMPANY**, a Corporation of the State of New Jersey, for Cancellation of the Tax Assessment for the year 1935 on Its Property Alleged to be Situate in the Taxing District of the City of Newark, County of Essex and State of New Jersey, and on the full amount of its Capital Stock paid in and Accumulated Surplus.

STIPULATION

It is hereby stipulated and agreed between the attorneys for the petitioner and the attorneys for the City of Newark, as follows:

The Universal Insurance Company is a corporation organized under the laws of the State of New Jersey, and on October 1st, 1934, the registered office was at #810 Broad Street, Newark, New Jersey. The figures constituting and making up the assessment as determined by the Essex County Board of Taxation are:

[fol. 13]

Taxable assets:

Capital Stock.....	\$400,000.00
Accumulated surplus as of September 30, 1934.....	838,682.39
Unearned premium reserved.....	336,725.77
Agency balances due.....	9,434.71
Total.....	\$1,584,842.87

Exemptions allowed by law:

Bonds of U. S. Government—Value as of September 30, 1934.....	\$110,290.00	
Bonds of municipalities of State of N. J.—Value as of Sept. 30, 1934.....	33,081.00	
Stocks of corporations not incorporated, under laws of State of N. J.—Value as of Sept. 30, 1934.....	470,704.00	
Stocks of corporations of the State of N. J.—Value as of Sept. 30, 1934.....	515,375.92	1,129,450.92
Balance.....		\$455,991.95

It is further stipulated and agreed that:

Cash on hand and on deposit as of Sept. 30, 1934, amounts to.....	\$240,828.89
Bonds secured on property located and taxed in the State of New Jersey—Value as of Sept. 30, 1934.....	15,689.00

Child, Riker, Marsh & Shipman, Attorneys for Appellant. Jno. A. Matthews, Attorney for Respondent.

(fol. 14)

EXHIBIT P. 2

Universal Insurance Company

Statement of Condition September 30, 1934

Amount of Capital paid in Cash

		\$400,000.00
Ledges Assets Dec. 31, 1933		
Premiums less Returns & Reins.		3,655,468.96
Interest and Dividends	\$896,365.73	
Increase in liabilities account Reinsurance	115,762.09	
Treaties		
Total Income	20,745.54	
		1,032,873.36
Disbursements		\$4,688,342.32
Losses paid less reins.		
Commissions expenses and taxes	\$467,797.18	
Loss from sales of securities	460,728.02	
Borrowed money repaid	6,229.78	
Total Disbursements	249,631.79	
Total Ledger Assets		1,184,386.77
		3,503,955.55
Ledger Assets		
Book value of investments	\$3,189,018.84	
Cash in Bank	240,828.89	
Agents Balances	96,657.18	
Reinsurance Recoveries	29,899.36	
Deposits with Boards	7,350.00	
Accrued Interest		3,503,955.55
Non-Ledger Assets		
Gross Assets		15,647.88
		3,519,603.43
Non-Admitted Assets		
Agents Balances over 90 days		
Book value of Bonds and Stocks over market value	\$9,434.71	
Total Admitted Assets	916,125.92	
		925,560.63
		2,594,042.80
Liabilities		
Reserve for outstanding losses	\$247,681.22	
Reserve for unearned premiums	336,725.77	
Reserve for salaries, rents and exp.	30,000.00	
Funds held under Reins. Treaties	160,156.97	
Due for borrowed money	580,796.45	
Capital	1,355,360.41	
Total Liabilities	400,000.00	
Surplus		1,755,360.41
		838,682.39
		\$2,594,042.80

[fol. 15] BEFORE STATE BOARD OF TAX APPEALS

UNIVERSAL INSURANCE COMPANY, Appellant,

v.

CITY OF NEWARK, Respondent

UNIVERSAL INDEMNITY INSURANCE COMPANY, Appellant,

v.

CITY OF NEWARK, Respondent

In the matter of the applications for cancellation, and in the alternative, for reduction of personal property tax upon capital stock and accumulated surplus of Universal Insurance Company and Universal Indemnity Insurance Company, New Jersey corporations claiming to have business situs in New York.

Appearances:

For appellants, Child, Riker, Marsh & Shipman, Esqs., by Jehiel G. Shipman, Esq.

For respondent, Frank A. Boettner, Esq., by John A. Matthews, Esq.

OPINION—Filed July 28, 1936

WEAVER, President:

These two appeals, presenting common questions of law and fact, were tried together. Both corporations are man- [fol. 16] aged by the same officers, operate from the same offices, and are represented by the same counsel. They are New Jersey corporations, maintaining registered offices at Newark, New Jersey, and business offices in New York City, managed and conducted by a New York corporation, Talbot, Bird & Company, Incorporated. With minor exceptions, all of their assets are kept in the State of New York.

The Board of Assessors of the City of Newark levied personal property assessments based upon their paid in capital and accumulated surplus. On appeal to the Essex County Board of Taxation, judgments reducing the assessments were entered by consent of the parties. Appellants seek to

have these assessments cancelled, or, in the alternative, reduced upon the following grounds:

(1) The Company is not taxable in New Jersey because its business situs is in New York.

(2) (a) That reserves for unearned premiums, and (b) reserves for agency balances over ninety days old, should not be included in the capital and accumulated surplus, thereby reducing the capital and accumulated surplus by the amounts represented by said items, and that after the deduction of property claimed to be exempt, no taxable capital or accumulated surplus remains.

(3) That cash on hand or on deposit is exempt, and should be deducted from the taxable capital and accumulated surplus.

Appellants are taxable under Section 307 of the General Tax Act, P. L. 1918, p. 858.

[fol. 17] The questions herein presented were reviewed at length by this Board in an opinion filed July 7, 1936, in the case of Newark Fire Insurance Company v. City of Newark, wherein it was held that the establishment of a permanent business situs in another State does not preclude the taxation of intangible personal property of a domestic corporation of this State; that reserves for unearned premiums and agency balances cannot be deducted from accumulated surplus; and that cash on hand or on deposit is exempt from taxation.

Stipulations of fact and financial statements of the companies were offered in evidence, from which it appears that in the Universal Insurance Company judgment entered by the County Board the following items were deducted from the assets in determining the accumulated surplus:

Reserve for outstanding losses	\$247,681.22
Book value of bonds and stocks over market value	916,125.92

Neither of these items is deductible from the assets in determining the accumulated surplus. See opinions of the Board in City of Newark v. Commercial Casualty Insurance Company and New Jersey Insurance Company v. City of Newark, filed July 14, 1936. The stipulations before this Board are to the effect that these items are deductible.

While parties may stipulate facts, they cannot stipulate matters of law. The question whether these items are deductible from the assets in determining the amount of accumulated surplus is a question of law.

The taxable capital paid in and accumulated surplus of the Universal Insurance Company is in excess of the assessment as made by the Board of Assessors of the City of [fol. 18] Newark, and under ordinary circumstances we would be required to restore the assessment as made by the Board of Assessors. However, we are without jurisdiction to change the judgment of the Essex County Board of Taxation, because it was entered by consent of the parties.

In *Borough of Kenilworth v. Board of Equalization of Taxes*, 78 N. J. L. 302; 72 A. 966, our Supreme Court said:

"The difficulty, however, with the appeal is that there was no controversy before the county board to review, for the record here shows that the assessor's assessment was presented to the county board, and there, after full consideration, ratified and confirmed with the consent of the borough officials. Having thus consented to the confirmation of its own assessment by the county board, it is not perceived how the petitioner can be said to be 'aggrieved,' or that 'any controversy' can be said to exist which can be the subject-matter for determination by the state board."

The same situation exists with respect to the appeal of the Universal Indemnity Insurance Company, except as to the amounts involved.

For the reasons stated, the appeals are dismissed.

[fol. 19] BEFORE STATE BOARD OF TAX APPEALS

In the Matter of Appeal of UNIVERSAL INSURANCE COMPANY from the Assessment of Property in City of Newark, County of Essex, for the year 1935

JUDGMENT—Filed July 28, 1936

An appeal in writing having been filed with the State Board of Tax Appeals, duly verified according to the rules of practice prescribed by said Board, by Universal Insurance Company in which it is alleged that an injustice has

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been done the said complainant by the assessment of certain property for taxation for the year 1935, located at City of Newark in the County of Essex consisting of personalty located at 51 Clinton street and that said property is assessed higher than the true value thereof;

After hearing evidence produced on the part of said complainant, and the said respondent, and the argument of Child, Riker, Marsh and Shipman, attorneys, by Jehiel G. Shipman, attorney for the complainant, and John A. Matthews, attorney for the City of Newark and after considering the same, it is on this Twenty-eighth day of July, nineteen hundred and thirty-six, at a session of the State Board of Tax Appeals, Ordered, Adjudged and Decreed, under and by virtue of the authority conferred by law, that the [fols. 20-41] assessment of \$455,400 on personalty, as reduced by the County Board of Taxation from \$500,000, levied for the year 1935 on the above described property, be affirmed and the appeal therefrom dismissed.

F. D. Weaver, President. M. R. Margerum, George Compton, David R. Smith, State Board of Tax Appeals.

Attest: Chas. E. Cook, Secretary.

[fol. 42] BEFORE STATE BOARD OF TAX APPEALS

49873

UNIVERSAL INSURANCE COMPANY, Petitioner,

VS.

CITY OF NEWARK, CO. OF ESSEX, Respondent

Assessment of 1935

DOCKET ENTRIES

Property: Personalty located at 51 Clinton Street.

Amount, \$455,400 Judgment, \$

L.

L.

B.

B.

P. 455,400

P.

1935.

Dec. 14. Petition filed.

1936.

March 31. Hearing fixed for April 28th at Trenton and notice sent.

DOCKET ENTRIES—Continued

- April 28. Case heard. Briefs to be filed.
 July 28. Memorandum filed.
 July 28. Judgment entered, dismissing appeal.
 Sept. 8. Application by counsel for petitioner to reopen judgment.
 Nov. 10. Application denied. Memorandum filed.

[fol. 43] BEFORE STATE BOARD OF TAX APPEALS**MINUTES OF BOARD**

State House, Trenton, New Jersey,
 Tuesday, March 31, 1936.

The Board met at 10:30 A. M. on the above date.

Present, President Weaver, Commissioners Compton, Margerum, Parkinson and Smith.

The Board fixed the following dates for hearing appeals:

Tuesday, April 28th: State House, Trenton, 5 Essex Co. cases. (Newark.)

State House, Trenton, New Jersey,
 Tuesday, April 28, 1936.

The Board met at 10:30 A. M., Advanced Time, on the above date.

Present, President Weaver, Commissioners Compton, Margerum, Parkinson and Smith.

The following calendar of appeals was called:

7. Universal Indemnity Insurance Company vs. City of Newark.

8. Universal Insurance Company vs. City of Newark.

These cases were heard jointly, Mr. Jehiel G. Shipman, of the firm of Child, Riker, Marsh and Shipman, appearing

for the petitioners and Mr. John A. Matthews, Special Counsel, appearing for the City of Newark.

[fol. 44] The Board heard the testimony of John T. Byrne on behalf of the petitioners, and reserved decision pending the filing of briefs.

.
State House, Trenton, New Jersey,
Tuesday, July 28, 1936.

The Board met at 10:30 A. M. on the above date.

Present, President Weaver, Commissioners Compton, Margerum, Parkinson, Smith, Berg and Moore.

.

President Weaver, Commissioners Margerum, Compton, Parkinson and Smith took up for consideration cases heard and awaiting decision and, after reviewing the evidence produced, ordered, judgments entered as follows:

Universal Indemnity Insurance Company vs. City of Newark. That the assessment of \$381,224 on personalty, as reduced by the County Board of Taxation from \$500,000, levied for the year 1935 on personalty located at No. 51 Clinton Street, be affirmed and the appeal therefrom dismissed.

A memorandum was filed in this case, setting forth the grounds for the conclusions reached.

Universal Insurance Company vs. City of Newark. That the assessment of \$455,409 on personalty, as reduced by the County Board of Taxation from \$500,000, levied for the year 1935 on personalty located at No. 51 Clinton Street, be affirmed and the appeal therefrom dismissed.

A memorandum was filed in this case, setting forth the grounds for the conclusions reached.

.

[fol. 45]: State House, Trenton, New Jersey,
Tuesday, September 8, 1936.

The Board met at 10:30 A. M. on the above date.

Present, President Weaver, Commissioners Margerum, Parkinson, Smith, Berg and Moore. Absent, Commissioner Compton.

.

Mr. Jehiel G. Shipman, on behalf of the petitioners, appeared before the Board and moved for the reopening of the judgments entered in the matter of the appeals of Universal Insurance Company and Universal Indemnity Insurance Co. vs. City of Newark, which appeals were dismissed on July 28, 1936, Mr. Andrew B. Crummy appeared on behalf of the City of Newark to oppose the granting of the motion. Mr. Shipman was instructed by the Board to file a petition verified by affidavit setting forth the grounds for the motion, which Mr. Crummy will have an opportunity to answer.

State House, Trenton, New Jersey,
Tuesday, November 10, 1936.

The Board met at 10:30 A. M. on the above date.
Present, President Weaver, Commissioners Compton, Margerum, Parkinson, Smith, Berg and Moore.

The Board took up for consideration the applications of Jehiel G. Shipman, counsel for the petitioners, for the reopening of the judgments entered in the matter of the [fol. 46] appeals of the Universal Insurance Co. vs. City of Newark and Universal Indemnity Insurance Co. vs. City of Newark. The applications were denied. A memorandum was filed by the Board setting forth the reasons for the dismissal of the applications.

BEFORE STATE BOARD OF TAX APPEALS

CERTIFICATE OF SECRETARY

I, Chas. E. Cook, Secretary of the State Board of Tax Appeals, do Hereby Certify, that the foregoing are true copies of the petition, judgment and proceedings in the matter of the appeal of Universal Insurance Company, from the assessment of property in the City of Newark County of Essex for the year 1935, as the same are taken from and compared with the originals, filed in the office of

the State Board of Tax Appeals, on the fourteenth day of December and other dates, A. D. 1935 and 1936, and now remaining on file and of record there.

In Testimony Whereof, I have hereunto set my hand and affixed the official seal of the Board, at Trenton this eighteenth day of December, A. D. 1936.

Chas. E. Cook, Secretary. (Seal.)

[fol. 47] IN SUPREME COURT OF NEW JERSEY

UNIVERSAL INSURANCE COMPANY, Prosecutor,

VS.

STATE BOARD OF TAX APPEALS OF THE STATE OF NEW JERSEY
and CITY OF NEWARK, Respondents

RULE FOR DEPOSITIONS

A writ of certiorari having been allowed in the above entitled case to review the judgment rendered by the State Board of Tax Appeals, filed on July 28, 1936, and application now being made by the prosecutor;

It is on this 30th day of November, 1936, Ordered that the parties hereto shall have leave to take depositions and testimony before a Supreme Court Commissioner on four days' notice, and that such depositions shall be used, together with the exhibits, as part of the record on the return and argument of the above cause.

Let this rule be entered.

Charles W. Parker, S. C. J.

[fol. 48] THE ESSEX COUNTY BOARD OF TAXATION

In the Matter of the Appeal of UNIVERSAL INDEMNITY INSURANCE COMPANY from the Assessment of Property in the City of Newark, County of Essex, for the Year 1935

JUDGMENT

An appeal in writing having been filed with the Essex County Board of Taxation, duly verified according to rules of practice prescribed by said Board, by Universal Indem-

nity Insurance Company, 51 Clinton Street, Newark, New Jersey in which it is alleged that an injustice has been done the said complainant by the assessment of its property for taxation for the year 1935, located at Newark in the County of Essex, consisting of personaity located at 51 Clinton Street;

After hearing evidence produced on the part of said complainant, and the argument of Jeremiah F. Hoover for the complainant, and John A. Matthews for the City of Newark and after considering the same, it is on this eighth day of November nineteen hundred and thirty-five, at a session of the Essex County Board of Taxation, Ordered, Adjudged and Decreed, under and by virtue of Chapter 120 of the Laws of 1906, that the assessment of \$500,000. be reduced to \$381,224.

[fol. 49] And it is Further Ordered, That this order be certified to the Collector of the City of Newark, County of Essex:

Max Drill, William F. Kearney, J. William Huegel,
Essex County Board of Taxation.

Attest: William P. Macksey, Secretary.

[fol. 50] IN SUPREME COURT OF NEW JERSEY

WRIT OF CERTIORARI

STATE OF NEW JERSEY, ss:

(L. S.)

The State of New Jersey to State Board of Tax Appeals of the State of New Jersey, Francis D. Weaver, president, George Compton, Mahlon R. Margerum, Thelma A. Parkinson, David R. Smith, Alex F. Berg and Hervey S. Moore, Members of the State Board of Tax Appeals; and City of Newark, County of Essex, Greeting:

We being willing, for certain reasons appearing by the affidavits presented on this application, to be certified of a certain judgment rendered on July 28, 1936, by the State Board of Tax Appeals, upon the appeal of the Universal Indemnity Insurance Company, from a judgment of the Essex County Board of Taxation entered on the 8th day of November, 1935, upon an assessment for taxation for the year 1935 made by the City of Newark, upon certain per-

sonal property of the Universal Indemnity Insurance Company alleged to be located in the Taxing District of the City of Newark, County of Essex and State of New Jersey, and listed as personal property located at 31 Clinton Street, Newark, N. J., to wit, the capital stock and accumulated surplus of the said company, Do Command You that you certify and send, under your seal, to our Justices of our Supreme Court of Judicature, at Trenton, on the 18th day of December, 1936, the said judgment of said State Board of Tax Appeals, filed July 28, 1936, together with all things touching and concerning the same, including all proceedings upon an application for re-hearing and the order denying same, as fully and completely as they remain before you, together [fol. 51] with this, our writ; that we may cause to be done thereupon what of right and justice and according to the laws of the State of New Jersey ought to be done.

Witness, Thomas J. Brogan, Esquire, Chief Justice of our Supreme Court, at Trenton, this 28th day of November, in the year of our Lord, One Thousand Nine Hundred and Thirty-Six.

Fred L. Bloodgood, Clerk.

Child, Riker, Marsh & Shipman, Attorneys for Prosecutor.

ALLOCATUR

The within writ is allowed this 28th day of November, 1936.

Let it be sealed.

Charles W. Parker, S. C. J.

[fol. 52] IN SUPREME COURT OF NEW JERSEY

UNIVERSAL INDEMNITY INSURANCE COMPANY, Prosecutor

vs.

STATE BOARD OF TAX APPEALS OF THE STATE OF NEW JERSEY
and CITY OF NEWARK, Respondents

On Certiorari

RETURN TO WRIT

The State Board of Tax Appeals doth herewith send to the Supreme Court of the State of New Jersey the petition,

judgment and proceedings in the matter of the appeal of Universal Indemnity Insurance Company, from the assessment of property located in the City of Newark, for the year 1935, as within it is commanded, as by the transcript under the seal of said Board hereto annexed more fully appears.

State Board of Tax Appeals, by Chas. E. Cook, Secretary. (Seal.)

[fol. 53] BEFORE STATE BOARD OF TAX APPEALS

In the Matter of the Application of UNIVERSAL INDEMNITY INSURANCE COMPANY, a Corporation of the State of New Jersey, for the Cancellation of the Tax Assessment for the Year 1935 on Its Property Alleged to be Situate in the Taxing District of the City of Newark, County of Essex and State of New Jersey, and on the Full Amount of Its Capital Stock Paid in and Accumulated Surplus

PETITION

To the State Board of Tax Appeals:

Your petitioner, Universal Indemnity Insurance Company, a stock insurance company other than life insurance company, incorporated under the laws of the State of New Jersey, and having its registered office in New Jersey at 810 Broad street, in the City of Newark, County of Essex and State of New Jersey, respectfully shows:

That petitioner is taxable under Chapter 236 Section 307 of the Laws of 1918, as a stock insurance company other than life insurance company, in the taxing district where its office is situate, upon the full amount of its capital stock paid in and accumulated surplus; that the main office of petitioner was on October 1, 1934 and now is situated at 111 John street, in the City of New York, County and State of New York, and not in the taxing district of the City of Newark, Essex County, New Jersey; that petitioner maintained on [fol. 54] October 1, 1934 a local underwriting department at No. 51 Clinton street, in the City of Newark, Essex County, New Jersey, but the business conducted in said local office was subject to confirmation at the main office of your petitioner in New York City.

Petitioner alleges that all of its personal property, constituting the full amount of its capital stock paid in and accumulated surplus had on October 1, 1934 and now has its business situs at the main business office of petitioner in the City of New York and not within the taxing district of the City of Newark. The executive offices and officers were located there, all the books of the company were kept there and all insurance contracts written by the underwriting department in New Jersey must be confirmed at the main office. All accounts and bills are collected and paid from the main office, including salaries. All the bank accounts of the company were kept in New York banks; all securities are kept in New York City, with the exception of securities of the par value of \$205,000.00 in the form of New York and New Jersey Municipal bonds which were on October 1, 1934 and now are on deposit with the Commissioner of Banking and Insurance of the State of New Jersey, in order that the company might transact business in New Jersey.

Petitioner has been assessed for the purposes of taxation for the year 1935, upon property alleged to be located at 51 Clinton street, Newark, Essex County, New Jersey, and upon the full amount of its capital stock paid in and accumulated surplus, in the sum of \$500,000.00, at which assessment petitioner is aggrieved, because petitioner can be assessed only in the taxing district where its main office [fol. 55] is situated, and the main office of the petitioner was not situated in the taxing district of the City of Newark on October 1, 1934 and because all of the personal property of the petitioner constituting and making up the full amount of its capital stock paid in and accumulated surplus as of October 1, 1934, had its business situs at the main office of the company, 111 John street, New York City, and not within the taxing district of the City of Newark. Said assessment should, therefore, be cancelled.

Petitioner is further aggrieved because the said assessment is in excess of the true value of the company's capital stock paid in and accumulated surplus for the following reasons:

First. In arriving at the full amount of the capital stock paid in and accumulated surplus, the tax assessor included the unearned premium reserve as a taxable asset, whereas, the said unearned premium reserve should be deducted as a non-taxable liability.

Second. The said assessor likewise included as a taxable asset in determining the capital stock paid in and accumulated surplus, certain agency balances due to the company from its agents located in other states than the State of New Jersey, upon all of which balances and accounts taxes have been actually assessed and paid within twelve months next before October 1, 1934.

Third. The said assessor included as a taxable asset in determining the capital stock paid in and accumulated surplus, the amount of cash on hand and in banks which the company had in its possession on October 1, 1934, which said cash was specifically exempted by Section 203 of Article 2, Paragraph 9 of Chapter 165 of the Laws of 1933.

[fol. 56] Petitioner, therefore, alleges that if all said proper and legal exemptions and deductions had been allowed, that the company would have had no legally taxable capital stock paid in and accumulated surplus.

That an appeal from the said assessment has been filed with the Essex County Board of Taxation, and upon the hearing of said appeal the attorney appearing for petitioner allegedly agreed with the attorney for the City of Newark, without the knowledge or consent of petitioner, to an assessment in the amount of \$381,224.00, and that judgment be entered for that amount; that your petitioner, upon learning of such alleged agreement, immediately, through its present counsel and upon notice to the City of Newark, made application to the said Essex County Board of Taxation for leave to withdraw the alleged agreement and any judgment entered thereon, and to proceed with the appeal, petitioner at all times having contended that the business situs of the property was not within the jurisdiction of the City of Newark; that the said application of petitioner was denied and the appeal was disposed of as follows:

The assessment of \$500,000.00 be reduced to \$381,224.00.

Petitioner, therefore, prays that for the reasons herein set forth, the entire assessment made against the company's property and its capital stock paid in and accumulated surplus, be cancelled.

Dated December 11, 1935.

Universal Indemnity Insurance Company, by Harry Bird, Vice-President. (Seal.)

[fol. 57] *Duly sworn to by Harry Bird. Jurat omitted in printing.*

STATE OF NEW JERSEY,
County of Essex, ss:

Edward G. Slingerland, being duly sworn according to law, on his oath says that he served a copy of the above petition and affidavit on Frank A. Boettner (attorney) of City of Newark (name of taxing district), personally, this 12th day of December, 1935.

Edward G. Slingerland

Sworn and subscribed before me this 12th day of December, 1935. Samuel P. Watson, Notary Public of New Jersey. (Seal.)

[fol. 58] STATE OF NEW JERSEY,
County of Essex, ss:

Edward G. Slingerland, being duly sworn according to law, on his oath says that he served a copy of the above petition and affidavit on William P. Macksey (Secretary) of the Essex County Board of Taxation, personally, this 12th day of December, 1935.

Edward G. Slingerland

Sworn and subscribed before me this 12th day of December, 1935. Samuel P. Watson, Notary Public of New Jersey. (Seal.)

[fol. 59] EXHIBIT P. 1

STATE BOARD OF TAX APPEALS

In the Matter of the Application of UNIVERSAL INDEMNITY INSURANCE COMPANY, a Corporation of the State of New Jersey, for Cancellation of the Tax Assessment for the Year 1935 on Its Property Alleged to be Situate in the Taxing District of the City of Newark, County of Essex and State of New Jersey, and on the Full Amount of Its Capital Stock Paid in and Accumulated Surplus

STIPULATION

It is hereby stipulated and agreed between the attorneys for the petitioner and the attorneys for the City of Newark, as follows:

The Universal Indemnity Insurance Company is a corporation organized under the laws of the State of New Jersey, and on October 1st, 1934, the registered office was at No. 810 Broad street, Newark, New Jersey.

The figures constituting and making up the assessment as determined by the Essex County Board of Taxation are:

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Taxable assets:

Capital stock.....	\$300,000.00
Accumulated surplus as of Sept. 30, 1934.....	202,675.92
Unearned premium reserved.....	223,204.17
Agency balances due.....	21,415.96
	<hr/>
	\$747,296.05

Exemptions allowed by law:

Bonds of U. S. Government—Value as of Sept. 30, 1934.....	\$45,750.00	
Bonds of municipalities of State of N. J.—Value as of Sept. 30, 1934.....	222,659.00	
Stocks of corporations not incorporated under laws of State of N. J.—Value as of Sept. 30, 1934.....	85,272.00	
Stocks of corporations of State of N. J.—Value as of Sept. 30, 1934.....	11,400.00	366,072.00
	<hr/>	
Balance.....		\$381,224.05

It is further stipulated and agreed that:

Cash on hand and on deposit as of Sept. 30, 1934, amounts to.....	\$117,697.07
Bonds secured on property located and taxed in the State of New Jersey—Value as of Sept. 30, 1934.....	13,366.00

Child, Riker, Marsh & Shipman, Attorneys for Appellant. Jno. A. Matthews, Attorneys for Respondent.

[fol. 61]

EXHIBIT P. 2

Universal Indemnity Insurance Company
Statement of Condition as of September 30, 1934

Income

Ledger Assets Dec. 31, 1933.....		\$1,138,361.53
Premiums less returns and reins.....	\$500,978.83	
Interest and Dividends.....	33,484.34	
Gain from sales of Investments.....	2,788.79	

Total Income..... 537,251.96

1,675,613.49

Disbursements

Losses paid less reins, etc.....	\$205,352.88
Commission expenses and taxes.....	150,703.14

Total Disbursements..... 356,056.02

1,319,557.47

Ledger Assets

Book value of Bonds and Stocks.....	\$996,863.67
Cash in Banks.....	117,697.07
Agents Balances.....	204,996.73

Total Ledger Assets..... 1,319,557.47

Non-Ledger Assets

Accrued Interest..... 3,770.25

Total Gross Assets..... 1,323,327.72

Non-Admitted Assets

Agents balances over 90 days due.....	\$21,415.96
Book value of Bonds and Stocks over market value.....	204,961.67

Total Admitted Assets..... 226,377.63

1,096,950.09

Liabilities

Reserve for outstanding losses.....	\$314,070.00
Reserve for unearned premiums.....	223,204.17
Reserve for commissions due.....	48,000.00
Reserve for other expense due.....	8,500.00
Subscriptions to Capital Stock.....	500.00

Capital..... 594,274.17
300,000.00

Total Liabilities..... 894,274.17
Surplus..... 202,675.92

\$1,096,950.09

[fol. 62] BEFORE STATE BOARD OF TAX APPEALS

In the Matter of Appeal of UNIVERSAL INDEMNITY INSURANCE COMPANY from the Assessment of Property in City of Newark, County of Essex for the Year 1935

JUDGMENT

An appeal in writing having been filed with the State Board of Tax Appeals, duly verified according to the rules of practice prescribed by said Board, by Universal Indemnity Insurance Company in which it is alleged that an injustice has been done the said complainant by the assessment of certain property for taxation for the year 1935, located at City of Newark in the County of Essex consisting of Personalty located at 51 Clinton street and that said property is assessed higher than the true value thereof;

After hearing evidence produced on the part of said complainant, and the said respondent, and the argument of [fols. 63-67] Child, Riker, Marsh and Shipman, attorneys by Jehiel G. Shipman, attorney for the complainant, and John A. Matthews, attorney for the City of Newark and after considering the same, it is on this Twenty-eighth day of July, nineteen hundred and thirty-six, at a session of the State Board of Tax Appeals, Ordered, Adjudged and Decreed, under and by virtue of the authority conferred by law, that the assessment of \$381,224 on personalty, as reduced by the County Board of Taxation from \$500,000, levied for the year 1935 on the above described property, be affirmed and the appeal therefrom dismissed.

F. D. Weaver, President. M. R. Margerum, George Compton, David R. Smith, State Board of Tax Appeals.

Attest: Chas. E. Cook, Secretary.

[fol. 68] IN SUPREME COURT OF NEW JERSEY

UNIVERSAL INSURANCE COMPANY, Prosecutor,

vs.

STATE BOARD OF TAX APPEALS OF THE STATE OF NEW JERSEY
and CITY OF NEWARK, Respondents

On Certiorari

STIPULATION RE CONSOLIDATION OF CASES

It is hereby stipulated and agreed that the above entitled case be consolidated with the case of Universal Indemnity Insurance Company against State Board of Tax Appeals of the State of New Jersey and City of Newark, now pending in the above entitled court on certiorari, for the hearing and argument in the aforesaid court and that one record may be printed of the proceedings in both cases and the depositions taken may be used at the hearing, as a part of the record in both cases.

Dated December 2d, 1936.

Child, Riker, Marsh & Shipman, Attorneys for Prosecutor.
Jno. A. Matthews, Attorney for City of Newark.

[fol. 69] BEFORE STATE BOARD OF TAX APPEALS

UNIVERSAL INDEMNITY INSURANCE COMPANY, Petitioner,

vs.

CITY OF NEWARK, Respondent

UNIVERSAL INSURANCE COMPANY, Petitioner

vs.

CITY OF NEWARK, Respondent

Statement of Evidence

Transcript of testimony taken in the above entitled matters before the State Board of Tax Appeals at the State House, Trenton, New Jersey on Tuesday, April 28th, 1936.

APPEARANCES

Child, Riker, Marsh & Shipman, Esqs., by Mr. Shipman, for the Petitioners.

Frank A. Boettner, Esq., by John A. Matthews, Esq., for the Respondent.

John F. Trainor, Court Reporter.

DISCUSSION RE STIPULATION

Mr. Shipman: If your Honor please, the points that we raise in this case are the same as were raised by Mr. Sandmeyer in the New Jersey Insurance Company case, the business situs theory and the unearned premium reserve and I have made—and also cash. There is certainly cash, which under the Statute, we claim should be deducted.

[fol. 70] President Weaver: There is no question but what you are trying these two cases both together?

Mr. Shipman: I think, we can. They are different types of companies. The Insurance Company does Marine and Fire and Indemnity does liability and the figures will be different, but I think, the testimony I will bring out will apply to both cases.

President Weaver: Any objection to trying the cases together?

Mr. Matthews: I have no objection to that.

President Weaver: There is no question at all, but what both of these companies are New Jersey companies?

Mr. Shipman: I have a stipulation here, two stipulations for each company, which shows that the registered office of both companies on October 1, 1934 was 810 Broad Street and that they are both New Jersey companies, and these stipulations show the figures upon which the county board based their assessment. I also have—

Mr. Matthews: Pardon me, Mr. Shipman. In signing this stipulation, we also want to say to the Board that these figures are from the books of the company and that they are correct.

Mr. Shipman: Oh, yes, sure, they are. I will offer those stipulations in evidence.

Mr. Matthews: We are consenting, in writing, to the stipulations in each one of the company's cases.

Stipulations above referred to marked Exhibit P. 1 in each case.

[fol. 71] Mr. Shipman: I have also here the copies of the condition of the two companies as of September 30th, 1934.

Mr. Matthews: Are they the same as you gave us?

Mr. Shipman: Yes.

Mr. Matthews: We have no objection to that being offered in evidence.

Mr. Shipman: I will put that in evidence for what it is worth, in each case.

Mr. Matthews: I will have to withdraw that consent. I thought we got a balance sheet.

Mr. Shipman: I thought you did, too.

Mr. Matthews: We didn't.

Mr. Shipman: You don't object to the figures as being correct? I will prove that by the auditor, that they came from the books, if you want it.

Mr. Matthews: No, your word is good enough for me for that.

Mr. Shipman: Then we can mark them both?

Statement of conditions of both companies marked Exhibit P. 2, in each case.

JOHN P. BYRNE, sworn for the Petitioner.

Direct examination.

By Mr. Shipman:

Q. Mr. Byrne, what is your office with the Universal?

A. Vice President and Secretary.

Q. And are you actively the manager of the business of those two companies?

Mr. Matthews: I am very sorry, but I didn't know you were going ahead with your testimony. We want to raise [fol. 72] the point in this case before the appellant puts in any of his case—

Mr. Shipman: Do you want to raise that now?

Mr. Matthews: If we raised it now, and the Court decides in our favor, we won't take your time and ours. Before the County Board, and when the insurances cases were called, as the record in the case up in Newark will show. Mr. Hoover arose and said: "I represent the Universal Indemnity Insurance Company and the Universal Insurance Company. These two insurance companies are incor-

porated in New Jersey, but have always done business in New York City. We have been recently doing a small amount of business in New Jersey. We are in a position to submit to the committee, or to counsel the figures in respect to our capital and surplus as a break-down of our securities, and I should think perhaps time would be saved if we submit them to Mr. Matthews." And then I said, "Mr. Matthews: we are perfectly glad to sit down with Mr. Hoover and perhaps arrive at a conclusion" and Commissioner Drill; that is the Chairman of the Essex County Tax Board said, "Didn't you receive a two weeks' notice on this case?" "Mr. Matthews: No, sir. I personally represent the City in these cases, and we received them on Saturday afternoon. Now, Mr. Hoover says that he is willing to submit the figures this afternoon and have them today or tomorrow morning at the latest. We are willing to sit down with him and agree on a settlement in the case [fol. 73] and then Commissioner Huegel said, "Can't you agree this afternoon?" Mr. Matthews: "We are perfectly willing. I shall be very glad to do it this afternoon." And then Mr. Solan, that was the Deputy Attorney General represented the Tax Board said: "Will the figures in this case be submitted? I assume, that you are going to submit them in writing" and Mr. Matthews: "We shall enter a stipulation at the end." And Mr. Solan said, "Will you submit it in brief form, so that this Board will know what the issue and what the argument on each side is in the respective matters" and then Commissioner Drill said, "in the form of briefs?" and Mr. Matthews said: "No, in the form of a short stipulation." After that Mr. Hoover and his accountant, Mr. Olsen, Mr. Crummy who is also an accountant as well as the lawyer and myself sat down and went over the figures of the two companies confessed judgment before the Essex County Board.

Mr. Shipman: Mr. Hoover confessed judgment?

Mr. Matthews: Mr. Hoover and Mr. Olsen and Mr. Barthel were there representing the companies and they confessed judgment and we humbly submit that the matter is res adjudicata.

President Weaver: The County Board acted, didn't they?

Mr. Matthews: The County Board accepted their agreement that they were taxable in this amount.

President Weaver: And they entered a judgment?

[fol. 74] Mr. Matthews: And they entered a judgment.

President Weaver: Of course, the matter is settled by section 10 of the County Board Act. The County Board having acted, the appellant here has a right to appear before this Board, because all actions of the County Board are appealable to this Board, so that we may enter a proper judgment. These cases are tried de novo?

Mr. Matthews: Yes.

President Weaver: And no matter what the County Board did, or what the judgment was before the County Board on the question of facts when you come here, you have got a new case, so your motion must necessarily be denied.

Mr. Matthews: Before I sit down, I except to your ruling. I was liking it to the fact, when we confessed judgment in the Courts below, we don't get much chance when we come in in this room before the Supreme Court or this Board.

Question repeated.

A. I am.

Q. How long have you been in the insurance business, Mr. Byrne?

A. 27 years.

Q. Where is the principal business office of the Universal Insurance Company and the Universal Indemnity Insurance Company? Where was that office on October 1, 1934?

A. 111 John Street, New York City.

Q. Previous to that date, where had the principal office of these two companies been?

[fol. 75] President Weaver: Do you mean that? You don't mean that, if this is a New Jersey Corporation.

Mr. Shipman: I mean the principal business office.

President Weaver: Let's keep our records straight.

Mr. Shipman: That is what I said, principal business office.

Question repeated.

Mr. Shipman: I mean principal business office.

A. At the same address.

Q. Is the business of these two companies conducted from that office?

A. It is.

Q. And was it on October 1, 1934?

A. It was.

Q. In what manner was it conducted by the companies themselves or through a manager or how?

A. Through a management corporation.

Q. What was the name of that corporation?

A. Talbot, Bird & Company, Incorporated.

Q. Is that a New Jersey or New York Corporation?

A. New York Corporation.

Q. And do these two companies conduct business throughout the whole United States?

A. They do.

Q. Authorized to do business in various States?

A. They are.

Q. And what kind of a business does the Universal Insurance Company do, principally?

A. Principally marine, but some fire and inland marine.

Q. And the Indemnity Company?

A. Automobile, liability and property damage.

[fol. 76] Q. Does the Indemnity Company also do business throughout other states other than New Jersey, throughout the United States?

A. It does.

Q. On October 1, 1934, did the Universal Insurance Company have any property within the City of Newark, the taxing district, any personal property?

A. I did not.

Q. Was there a bank account?

A. Yes, there was a small bank account.

Q. In what bank was that in?

A. National Newark and Essex.

Q. Was there an office in Newark of any sort?

A. There was a service office.

Q. And you had agencies throughout the State, too?

A. Yes.

Q. And other counties?

A. Yes.

Q. Just the same as you had in other States?

A. Correct.

Q. Where were the accounts for underwriting premiums due, collectable and payable?

A. In New York City.

Q. At the home office?

A. At the management office.

Q. Of both companies?

A. Of both companies.

Q. Did the agents here in New Jersey and in other States where you did business have any authority to hold the money to collect money due on premiums?

A. They did.

Q. For what purpose?

A. For remittance to New York.

Q. They had no control over the investment of management of that money?

A. They did not.

Q. Where was the auditing department of the company at that time?

A. In New York.

[fol. 77] Q. Where were all of the securities on October 1, 1934?

A. In New York.

President Weaver: I take it, like in Mr. Sandmeyer's case, there were no tangibles in New Jersey and the intangibles were all in New York State?

Mr. Shipman: That is correct.

Q. The agents from the various states would report underwritings to the company, to the management company?

A. That is correct.

Q. And did they go to New York?

A. Yes, sir.

Q. Did you have deposits with the Insurance Departments of the various states in which you did business for these two companies?

A. We did.

Q. In the form of what—securities?

A. Bonds and securities.

Q. Did you pay taxes in the States where you conducted business for the two companies?

A. We did.

Q. And what kind of a tax did you pay?

A. Premium tax.

Q. Was that generally the case throughout all of the States where you did business?

A. It was.

Q. A premium tax?

A. Yes.

Q. Did you pay a tax in New York? Do you pay a tax?

A. We do.

Q. What kind of a tax do you pay there?

A. A premium tax.

Q. You don't pay any personal property tax?

A. We do not.

Q. What proportion of the insurance premium of the Universal for the year 1934 came from policies that were [fol. 78] issued covering risks in the State of New Jersey, do you know?

A. I know it approximately. Approximately 7%.

Q. Have you a general idea of the total amount of premiums are collected on underwritings for the Universal Insurance Company?

A. Net premiums were somewhere around \$890,000, approximately.

Q. So that the New Jersey business would run to around \$70,000 at that rate?

A. That is correct.

Q. How about the Indemnity Company?

A. The amounts were somewhat larger. I would have to refresh myself as to the figures.

President Weaver: That might be quite important here as to the Indemnity Company.

Q. If I called your attention to figures for that year, say, around \$500,000 in total net premiums for the Indemnity Company, would that appear to be somewhere correct?

A. Somewhere near correct, yes, sir.

Q. And is that amount somewhere around \$400,000 written in New Jersey?

President Weaver: I had more special reference to the reserve for losses.

Mr. Shipman: There isn't any question of the reserve for losses.

President Weaver: Didn't they set up any reserve for losses?

Mr. Shipman: Yes, but that was allowed as a deduction in our case.

President Weaver: By whom, by the City?

[fol. 79] Mr. Shipman: Yes. The only question in our case is the reserve for unearned premiums and I am coming to that now.

President Weaver: There is another point here, how much actual securities are deposited with the Banking Commissioner of New Jersey, and what do they consist of?

Q. What securities are deposited here, Mr. Byrne?

A. About \$60,000 of government bonds for the Universal Insurance Company and \$200,000—

President Weaver: Are they all government bonds?

The Witness: All government bonds, in that case. And \$200,000 government and municipal bonds for the Indemnity Company.

Q. Was that condition as of October 1, 1934?

A. Yes.

President Weaver: How much of those municipal bonds were New Jersey bonds?

The Witness: Practically, I should say \$150,000 of the \$200,000 were New Jersey municipal bonds.

President Weaver: And the rest are foreign?

The Witness: No, government bonds. Of the \$200,000.

President Weaver: All of the municipal bonds are not New Jersey municipal bonds?

The Witness: Practically all, I should say so.

President Weaver: You should say so?

[fol. 80] The Witness: I can't tell exactly, but my recollection is that the majority of them were.

President Weaver: That burden is on you.

Mr. Shipman: I can bring that out, but it is my thought an insurance company is taxable on its capital stock and surplus; and therefore, the capital stock and surplus is made up of property, of course.

President Weaver: I know, but you are proceeding under a different theory. You have taken all of the securities out of the State to escape taxation, and escaping taxation.

Mr. Shipman: We haven't taken them out.

President Weaver: I am not criticising you for that. They are out of the State, according to your theory, they are out of the taxing powers of New Jersey. Whether that is proper or not, we have to determine. It seems to me, if that theory is correct, then, perhaps the only property subject to taxation would be the property, or at least the securities that are pledged with the Banking Commissioner. No doubt government bonds are free from taxation and New Jersey municipal bonds are free from taxation. Whether foreign municipal bonds are free from taxation, I don't know. I think, you ought to bring that out.

Mr. Shipman: My thought was, of course, this is a different case from a tax on personal property. An insurance company is taxed on its capital stock and surplus and we [fol. 81] have got to take certain items to make that up.

President Weaver: I know, but don't you see—

Mr. Shipman: It doesn't make any difference what is in New Jersey and what isn't, if the business situs is in New York City, then they can't be taxed at all, because you can't find anything to make up that capital stock and surplus.

President Weaver: The answer to that is, if it is a New Jersey corporation, it should be taxed as provided by the Statute, and those securities, while they are out of the State, although they are not physically here, they are here, because they are the property of the Insurance Company. This is not the case, it don't seem to me—I don't know—where a miscellaneous corporation, which was taxed in the ordinary way has certain tangibles here in the State, and certainly intangibles which may be deposited in other States. They may not be subject to taxation in New Jersey at all, because they have acquired a different situs, but here is an insurance company that gets its life and its being and its right to do business from the State and being taxed the way it is, it is a question to my mind whether the securities taken out of it—I am not settling it at all.

Mr. Shipman: I think it is a little bit different from the ordinary case, in which your Honor has held intangibles, like bonds out of the State, are assessable here. The theory of the case is that a business situs is elsewhere.

[fol. 32] President Weaver: I have held where estates were involved—

Mr. Shipman: Yes.

President Weaver: There, of course, it is a little different proposition, because the Statute provides these securities shall not be taken out of the State without leave of the court.

Mr. Shipman: But I just want to make that distinction. This is a business situs; that this business is all done in New York; and therefore, the situs of the company and of its property for tax purposes is not within the taxing district.

President Weaver: It would seem a little inconsistent.

Mr. Shipman: I have decisions on which I think—I hope to be able to—I don't want to argue the matter now and take up time.

Q. Now then, I want to ask Mr. Byrne on the statement on this stipulation here marked P. 1, there is an item of unearned premium reserve of the insurance company amounting to \$336,725.77. Will you explain just what that unearned premium reserve represents and how it is set up?

A. It is a reserve to compel—the company is compelled to set up by the Insurance Department of the various States. It is there for several purposes, all for the protection of the policy holder. If the policy holder at any time cancels his policy, the returned premium is paid out of this unearned premium reserve. During the course of business an insurance company finds very often that their loss is a great deal more on particular classes of business, and if [fol. 83] they cancel the insurance, because of that loss, they must return the premium to the assured.

President Weaver: They prorate it?

The Witness: They prorate it. Whatever belongs to the assured, must be returned to the assured out of that reserve which is set up. If the company gets into difficulty, the Insurance Department, of course, compels it to liquidate through that reserve and if at any time it stops writing a class of business, but desires to keep the premium, all of the losses that accrue after that date are paid out of the unearned premium reserve.

Q. The amount of that unearned premium reserve is checked by the Insurance Department here in New Jersey, isn't it?

A. Yes, sir.

Q. And do you know whether that particular item has been examined by the Insurance Department here?

A. It was.

Q. And O. K.'d?

A. It was O. K.'d.

Q. You are required by the department to set that up as a liability?

A. They compel us to, and if we haven't got enough up, they compel us to put up some more.

Q. In case you want to sell your underwritings in the case of bad business, that unearned premium reserve would be used for that purpose, would it not?

A. Correct.

Mr. Matthews: Do I understand you say you are compelled by the department to set it up as a liability, is that correct?

The Witness: That is correct.

President Weaver: Is there anything that can be produced here to indicate the nature of these securities which are outside of New Jersey? Suppose, I get to that point, it may be these are classes of securities that the assessment would be entirely wiped out by reason of their nature. Of course, you don't think that point ought to be reached, and it may be reached and in that event it may be very helpful to know what these securities are.

Mr. Shipman: In the stipulation here, your Honor, all of the stocks—

President Weaver: You must forgive me. I don't know what the stipulation contains.

Mr. Shipman: Of course, you don't. All of the stocks, government bonds, municipal bonds, stocks of corporations, both of New Jersey and out are all allowed as an exemption by the City wherever they are; so therefore, they are out anywhere, as I see it, stocks are exempt.

President Weaver: They may or may not be. If the City has gone to that point, that is no affair of mine.

Mr. Matthews: We have stipulated that, and that is why I haven't gone into that.

President Weaver: That clears that up. I didn't know the City was so liberal.

Mr. Matthews: It is your decision. We can't stipulate the law away, but we are perfectly willing to agree with them on anything they want.

President Weaver: That is not stipulating the law away. You may stipulate all of the facts you please, but when it comes to stipulating the law, that is for the Board.

[fol. 85] Mr. Shipman: I guess that is all, I want from Mr. Byrne. Cross examine.

Cross-examination.

By Mr. Matthews:

Q. When I asked you did you say that that premium reserve, you were compelled by the Banking and Insurance Department to set it up as a liability and you gave what use is made of it in certain emergencies, do you think the reason

the department has you set that up as a liability is just for that reason, or don't they want you to use it for the payment of dividends?

A. The reason they do it is for the protection of the policy holders.

Q. Have you any property, any tangibles in New York?

A. The Company?

Q. Yes. You have a big office over there?

A. Quite a large office, yes.

Q. What is its value in each company or are they both together?

A. We have four companies there.

Q. You don't pay any tax over there, do you, any personal tax?

A. The companies don't, no.

Q. You don't pay any in New Jersey either, if Mr. Shipman's contention is true, is that right?

A. That is correct.

President Weaver: Of course, that is unimportant.

Mr. Matthews: It is nice to tell it to Shipman. All right, that is all.

Mr. Shipman: I would like to call Mr. Olsen, but I don't know whether he can give me those figures on those policies.

President Weaver: Why not send them in. We will take your word for it. I don't think there is another thing.

[fol. 86] Mr. Shipman: I will argue the question of cash in my brief, shall I?

President Weaver: Oh, yes, let's have briefs in ten or fifteen days.

The hearing then adjourned.

CERTIFICATE OF STENOGRAPHER

I, John F. Trainor, the stenographer designated by the State Board of Tax Appeals to report stenographically the evidence given before said Board upon the hearing of the appeals of Universal Insurance Company and Universal Indemnity Insurance Company, from the assessments of taxes made by the City of Newark, for the year 1935, do hereby certify that the foregoing is a true and correct transcript of the evidence given before said Board at the hearing on Tuesday, April twenty-eighth, 1936.

In witness whereof I have hereunto set my hand and seal
this eighteenth day of December, 1936.

John F. Trainor, (Seal.)

[fol. 87]

CERTIFICATE OF SECRETARY

I, Chas. E. Cook, Secretary of the State Board of Tax Appeals, do hereby certify and send to the Justices of the Supreme Court the foregoing transcript, as a true and correct transcript of the evidence given before said Board upon the hearing of the appeals of Universal Insurance Company and Universal Indemnity Insurance Company, from the assessments of taxes made by the City of Newark, for the year, 1935, said evidence having been submitted at the hearing on Tuesday, April twenty-eighth, 1936.

In witness whereof I have hereunto set my hand and affixed the official seal of the Board, at Trenton, this eighteenth day of December, 1936.

Chas. E. Cook. (Seal.)

[fols. 88-110] IN SUPREME COURT OF NEW JERSEY

UNIVERSAL INSURANCE COMPANY, Prosecutor,

vs.

STATE BOARD OF TAX APPEALS OF THE STATE OF NEW JERSEY
and CITY OF NEWARK, Respondents

UNIVERSAL INDEMNITY INSURANCE COMPANY, Prosecutor,

vs.

STATE BOARD OF TAX APPEALS OF THE STATE OF NEW JERSEY
and CITY OF NEWARK, Respondents

On Certiorari

Statement of Evidence

Transcript of testimony taken in the above entitled causes before Nicholas W. Bindseil, Esq., as Supreme Court Commissioner, by consent without notice, at the office of John A. Matthews, Esq., National Newark and Essex Building, on Wednesday, December 23rd, 1936, at 3 P. M.

APPEARANCES

Messrs. Child, Riker, Marsh & Shipman, by J. G. Shipman, Esq., representing the prosecutors.

Honorable John A. Matthews, and Andrew Crummy, Esq., representing the respondents.

[fol. 111] JOHN T. BYRNE, a witness called in behalf of the prosecutors, being first duly sworn according to law, on his oath testified as follows:

Direct examination.

By Mr. Shipman:

Q. You are the vice-president and a director of the Universal Insurance Company?

A. I am.

Q. And of the Universal Indemnity Insurance Company?

A. Yes, sir.

Q. Did the assessments that were levied by the City of Newark against the capital stock and accumulated surplus of those two companies come to your personal attention?

A. Yes.

Q. In the year 1935?

A. Yes.

Q. And what action did you take with respect to those assessments?

A. I asked Mr. Barthel, our cashier, to get in touch with Congleton, Stallman & Hoove, to ascertain what it was all about. He—

Mr. Matthews: I object to the conversation.

Q. What authority did you give your attorneys with respect to action on those assessments?

A. No authority whatsoever, except to observe what was going on in connection with the assessments.

Q. Did you give any authority to make any agreements with the City of Newark to fix the amount of the assessments for the two companies?

A. Absolutely none.

Q. For the year 1935?

A. No.

Q. Did the Board of Directors of your company give any authority to your attorneys to make any such agreement as [fols. 112-136] that?

A. No, they did not.

Q. Was any agreement fixing the assessment of any amount for the year 1935 of those two companies ever submitted to you or to your Board of Directors for confirmation?

A. There was not.

Q. Did you or did the Board of Directors of the company ever consent to having judgment entered by the Essex County Board of Taxation against the Universal Indemnity Insurance Company in the amount of \$381,224, and against the Universal Insurance Company in the amount of \$455,400?

A. No.

Q. Did you authorize Mr. Barthel, your cashier, or Mr. Olsen, your auditor, to enter into any agreement with the City fixing the amount of the assessments for taxes for the two companies for the year 1935, or to consent to the entry of judgment by the Essex County Board of Taxation against the two companies in the amounts I have named in the previous question?

A. No, I did not.

Q. Now, Mr. Byrne, with reference to the exhibit which has been marked in evidence P. 1, the form of annual statement which is required to be filled out by insurance companies for the State Department of Banking and Insurance, referring particularly to the unearned premium reserve, is there any particular asset which is set off to represent the item of unearned premium reserve as set up in that statement?

A. There is not.

Q. And do you segregate any assets to—

Mr. Matthews: We do not contend there is any particular asset.

[fol. 137] IN SUPREME COURT OF NEW JERSEY

UNIVERSAL INSURANCE COMPANY, Prosecutor,

vs.

STATE BOARD OF TAX APPEALS OF THE STATE OF NEW JERSEY
and CITY OF NEWARK, Respondents

UNIVERSAL INDEMNITY INSURANCE COMPANY, Prosecutor,

vs.

STATE BOARD OF TAX APPEALS OF THE STATE OF NEW JERSEY
and CITY OF NEWARK, Respondents

On Certiorari

REASONS FOR REVERSAL—Filed December 26, 1936

The prosecutors by Child, Riker, Marsh & Shipman, their attorneys, come and pray that the judgments rendered against them by the State Board of Tax Appeals confirming the personalty assessments levied against them for the year 1935 by the Essex County Board of Taxation may be reversed, set aside and for nothing holden for the following reasons:

1. The said State Board of Tax Appeals erred in holding that the prosecutors were taxable in the State of New Jersey for the personal property allegedly owned by them, since all [fol. 138] of said personal property was physically located outside of this State and all of said personal property had established a business situs outside of this State, to wit, in the State of New York.

2. That said Board erred in holding that reserves for unearned premiums cannot be deducted from assets in determining the amount of accumulated surplus upon which prosecutors are liable to taxation.

3. That said Board erred in holding that reserves for agency balances cannot be deducted from assets in determining the amount of accumulated surplus upon which prosecutors are liable to taxation.

4. That said Board erred in holding that reserves for outstanding losses cannot be deducted from assets in de-

termining the amount of accumulated surplus upon which prosecutors are liable to taxation.

5. That said Board erred in holding that the difference of book value of stocks and bonds over market value cannot be deducted from assets in determining the amount of accumulated surplus upon which prosecutors are liable to taxation.

6. That said Board erred in holding that the judgments for assessments rendered against prosecutors by the Essex County Board of Taxation were entered by consent of the parties and that, therefore, it, the said Board, did not have jurisdiction to change said judgments.

7. That said Board erred in refusing to permit prosecutors to present evidence in support of their contention that the judgments rendered against them by the Essex [fol. 139] County Board of Taxation were not entered by or with their consent.

8. That said Board erred in refusing to permit prosecutors to present evidence in support of their contention that reserves for outstanding losses and the difference of book value of stocks and bonds over market value are properly deductible from assets in determining the amount of accumulated surplus upon which prosecutors are liable to taxation.

9. That the judgments entered against prosecutors by said Board subject prosecutors to double taxation and confiscate and deprive prosecutors of their property without due process of law, contrary to the provisions of the Fourteenth Amendment to the Constitution of the United States.

10. That the proceedings had before said Board and the judgments rendered against prosecutors by said Board are in divers other respects irregular, illegal, oppressive and unjust to prosecutors.

Child, Riker, Marsh & Shipman, Attorneys for Prosecutors.

[fol. 140] IN SUPREME COURT OF NEW JERSEY, MAY TERM,
1937

No. 216/217

UNIVERSAL INSURANCE COMPANY, Prosecutor,

vs.

STATE BOARD OF TAX APPEALS OF THE STATE OF NEW JERSEY
and CITY OF NEWARK, Respondents

UNIVERSAL INDEMNITY INSURANCE COMPANY, Prosecutor,

vs.

STATE BOARD OF TAX APPEALS OF THE STATE OF NEW JERSEY
and CITY OF NEWARK, Respondents

RULE AFFIRMING JUDGMENT—Filed September 25, 1937

The court having inspected the transcript and proceedings of the State Board of Tax Appeals returned with the certiorari in this cause, and the reasons for reversing the judgment below, and heard the argument of counsel therein, and having duly considered the same:

It is, on this 25th day of September, 1937, Ordered, that the judgment of the State Board of Tax Appeals be in all things affirmed, with costs.

Entered September 25th, 1937.

On motion of John A. Matthews, Special Counsel to the City of Newark.

[fol. 141] IN SUPREME COURT OF NEW JERSEY, MAY TERM,
1937

UNIVERSAL INSURANCE COMPANY, Prosecutor,

v.

STATE BOARD OF TAX APPEALS OF THE STATE OF NEW JERSEY
and CITY OF NEWARK, Respondents

UNIVERSAL INDEMNITY INSURANCE COMPANY, Prosecutor,

v.

STATE BOARD OF TAX APPEALS OF THE STATE OF NEW JERSEY
and CITY OF NEWARK, Respondents

Argued May 6, 1937. Decided August 31, 1937

On Certiorari

Before Justices Bodine, Heher and Perskie

For the prosecutors, Child, Riker, Marsh & Shipman.

For the respondents, John A. Matthews (Andrew B. Crummy, on the brief).

OPINION—Filed September 1, 1937

The opinion of the court was delivered by

PERSKIE, J.:

This is a taxation case. The facts in the case at bar are practically identical; save as to the names of the parties, their respective addresses here and in New York, and the figures, with those set forth in the case of Newark Fire Insurance Co. v. State Board of Tax Appeals (Supreme Court), 118 N. J. L. 525. The issues presented and decided [fol. 142] in that case were (1) jurisdiction to tax; (2) taxation upon the item of unearned premium reserve; and (3) taxation upon cash. The issues presented for decision in the case at bar are (1) jurisdiction to tax; (2) taxation upon unearned premium reserve; (3) taxation upon reserve for outstanding losses; and (4) taxation upon the item of book value of stocks and bonds over market value.

Deciding as we do that there is no difference in principle, for the purpose of taxation, between the item of reserve for

losses and the item of unearned premium reserve, which we held to be taxable, our decision in the case of Newark Fire Insurance Co. v. State Board of Tax Appeals, *supra*, is dispositive of all issues in the case at bar save the fourth, wherein prosecutors contend that it was error to include the item of book value of its stocks and bonds over the market value thereof as a taxable asset.

In support of its contention it is argued that the regulations of insurance companies require book value of securities to be set up. These same regulations, it is pointed out, require the amortized value of the bonds, and the market value of the stock to be set up under the heading of "Non-admitted assets." The board included these last two items as an asset, whereas prosecutors contend that the true value is to be determined by deducting the market value of stocks, and the amortized value of bonds from the book value and that this is done by first setting up the book value and then deducting the difference between the book value and the market or amortized value so that the net value is reflected in admitted assets with market value.

We perceive in this contention nothing more than another of the many varied attacks already made by the taxpayer [fol. 143] upon the tax exacting authority in the time immemorial and continuing struggle between these two opposing forces. It presents nothing new. There is ample strength, ample precedent in the law to withstand and completely repel this assault. The basic weakness of this attack is that prosecutors proceed on the theory that exchange value or market value is the invariable test of true value under all circumstances. This is not so. In the words of our Court of Errors and Appeals in *Newark v. Tunis*, 82 N. J. L. 461; 81 Atl. Rep. 722 (opinion by Parker, J.), " * * * true value is not always to be ascertained by reference to selling price; * * * special circumstances may increase or depress market value without affecting true values or vice versa." And, on the other hand, as pointed out in that opinion by reference to the opinion of the Supreme Court (81 N. J. L. 45; 81 Atl. Rep. 490—opinion by Swayze, J.) there are many factors, not by way of limitation but rather by way of example, such as "good will, dividend earning power, ability in management, public confidence," &c., which are not reflected in book value. Under the tax law it is the duty of the assessor to make an independent investigation of these and all other factors in de-

termining the true value. The case of *Newark v. Tunis*, supra, stands, therefore, for the principle that, under ordinary and normal conditions, exchange or market value is a workable but not an invariable test of true value. "It (market value) is nothing more than a convenient index and evidence of true value under ordinary and normal conditions." *Id.* (at p: 463).

Thus the same court recently (1935) gave forceful illustration to the variability of the working rule. In determining true value, at a time of a depression when market prices were of no service, it held that, while county boards were not bound by bank figures (*Newton Trust Co. v. Atwood*, 77 N. J. L. 141; 71 Atl. Rep. 110; they must base their determination upon all the evidence) they were not obliged to rewrite them, and that since the bank made its own statement as to the value of its assets it could not, under the circumstances of that case, be heard to complain when those figures were accepted by local and state boards. *Second National Bank v. State Board of Tax Appeals*, 114 N. J. L. 573; 178 Atl. Rep. 96, and cases therein cited. The stated principles applicable to bank stock are also applicable to other stocks and bonds.

Prosecutors seek to distinguish the instant case from the *Second National Bank* case by pointing out, as already noted, that in the case at bar they were, pursuant to state requirements or regulations, obliged to set up market value of stock under the heading of "non-admitted assets," whereas in the *Second National Bank* case the book value was voluntarily set up. This is without merit. If prosecutors concluded the regulation complained of abortive, they should have sought recourse to the law; their statement had, moreover, no binding effect. *Newton Trust Co. v. Atwood*, supra. It was merely one of the factors which the county board was duty bound to consider with all other factors in the cause. From all that has been written, it is quite obvious that there is no hard and fixed rule and force that is to be given by those charged with the duty of determining true value to each and every factor pertinent and ascertainable in a given case. That necessarily must depend upon the facts and circumstances of each particular case. Having ascertained the applicable factors determinative of true value, we next consider how these factors are to be admeasured in money. Our answer is as follows: what would the property sell for, as of the day it

was assessed, at a fair and bona fide sale by private contract; or what in the opinion of the assessor, based on his investigation and all the proofs, could be obtained for the property in money at a fair sale, as of the day it was assessed, between a willing seller and a willing buyer, that is one not obliged to sell dealing with one not obliged to buy? *New Jersey Bell Telephone Co. v. City of Newark*, 118 N. J. L. 490.

"Taxation is an intensely practical matter * * *"
Farmers Loan and Trust Co. v. Minnesota, 280 U. S. 204; 74 L. Ed. 371, 375. It is an intense reality. We are of the opinion that the rule stated in the *Bell Telephone* case is comprehensive, it is intensely practical and real, it embodies all of the factors necessarily determinative of true value.

We are not at all convinced that the taxing authorities did not, in the case at bar, give due and proper regard to all the facts and circumstances necessarily applicable in determining the true value of prosecutor's taxable property.

We desire to mark the fact that we have not overlooked the point made by respondents that the state board of tax appeals was without jurisdiction because the judgment of the *Essex County Board of Taxation* was entered by consent of the parties. *Kenilworth v. State Board of Equalization of Taxes*, 78 N. J. L. 302; 72 Atl. Rep. 966. We pause long enough to make the observation that the holding of the state board of tax appeals sustaining the point [fol. 146] was reached only after it had given full consideration to all of prosecutor's points and had found them to be without merit. Because of either state and public concern, or section 11 of the *Certiorari act* (1 Comp. Stat. 1709-1910, pp. 402, 406) or both, we have reached our result on the merits.

Judgment is affirmed, with costs.

[fol. 147] IN SUPREME COURT OF NEW JERSEY

UNIVERSAL INSURANCE COMPANY, Prosecutor,

VS.

STATE BOARD OF TAX APPEALS OF THE STATE OF NEW JERSEY
and CITY OF NEWARK, Respondents

UNIVERSAL INDEMNITY INSURANCE COMPANY, Prosecutor,

VS.

STATE BOARD OF TAX APPEALS OF THE STATE OF NEW JERSEY
and CITY OF NEWARK, Respondents

On Certiorari

NOTICE OF APPEAL AND GROUNDS OF APPEAL—Filed December
18, 1937

To Respondents, State Board of Tax Appeals of the State
of New Jersey and City of Newark:

Take Notice that the prosecutor appeals to the Court of
Errors and Appeals in the last resort in all causes from
the whole of the judgment of the Supreme Court entered
in this cause on the following ground:

[fols. 148-176] 1. The Supreme Court erred in affirming
the judgment of the State Board of Tax Appeals and in
dismissing the writ of certiorari herein.

Child, Riker, Marsh & Shipman, Attorneys for Pros-
ecutors.

Dated November 18th, 1937.

Sat below: Bodine, J.; Heher, J.; Perskie, J.

Service of a copy of the within notice of appeal and
grounds of appeal is hereby acknowledged this 22nd day
of November, 1937.

Jno. A. Matthews, Attorney for City of Newark.

Service of a copy of the within notice of appeal and
grounds of appeal is hereby acknowledged this 19th day of
November, 1937.

Chas. E. Cook, Secretary, State Board of Tax Ap-
peals.

[fol. 177] IN SUPREME COURT OF THE UNITED STATES

UNIVERSAL INSURANCE COMPANY, Appellant,

VS.

STATE BOARD OF TAX APPEALS OF THE STATE OF NEW JERSEY
and THE CITY OF NEWARK, Respondents

UNIVERSAL INDEMNITY INSURANCE COMPANY, Appellant,

VS.

STATE BOARD OF TAX APPEALS OF THE STATE OF NEW JERSEY
and THE CITY OF NEWARK, Respondents

PETITION FOR APPEAL FROM THE COURT OF ERRORS AND AP-
PEALS OF THE STATE OF NEW JERSEY TO THE SUPREME
COURT OF THE UNITED STATES—Filed October 13, 1938

To the Honorable Louis D. Brandeis, Associate Justice of
the Supreme Court of the United States:

Your petitioners, Universal Insurance Company and
Universal Indemnity Insurance Company, respectfully
show:

1. Petitioners are the appellants in the above entitled
cause and their cases were consolidated for hearing and
argument in the Court of Errors and Appeals of the State
of New Jersey and petitioners have likewise consolidated
their cases for the purpose of hearing and argument before
this Court, the questions of law involved in both cases being
identical.

2. On August 16th, 1938, there was duly presented to the
Honorable Luther A. Campbell, Chancellor of the State of
New Jersey and Presiding Judge of the Court of Errors
and Appeals of the State of New Jersey, a petition for
appeal in the above entitled cause, together with assign-
ments of error, prayer for reversal, statement of jurisdic-
tion, order for appeal and bond.

3. On August 16th, 1938, Honorable Luther A. Campbell,
Chancellor and Presiding Judge as aforesaid, denied your
petitioners' said petition for allowance of appeal, solely
on the ground of lack of jurisdiction. His said denial of
[fol. 178] said appeal is endorsed upon the face of said
petition for appeal which is presented herewith.

4. Petitioners state that they were, on October 1, 1934, and now are incorporated under the laws of the State of New Jersey. On said date both companies had registered offices in the City of Newark, Essex County, New Jersey. The home offices of both companies were on said date, and at the present time are located at 111 John Street, in the City and State of New York. All of the intangible assets, including securities, bank accounts, cash, books and records were at that time and now are kept at the home offices in the City and State of New York.

5. The City of Newark assessed a personal property tax against the capital stock and accumulated surplus of the petitioners as of October 1, 1934, pursuant to Chapter 236 of the Laws of New Jersey of 1918, Sections 202, 301 and 307, now changed to Revised Statutes of New Jersey for 1937, Sections 54: 4-1, 54: 4-9 and 54: 4-22. Petitioners appealed from these assessments to the Essex County Board of Taxation, where judgments were rendered, reducing said assessments but not cancelling the same. Petitioners thereupon appealed to the State Board of Tax Appeals of the State of New Jersey, and a full hearing was held, and petitioners contended that the City of Newark had no legal right or jurisdiction to assess petitioners' personal property which was outside of the jurisdiction, petitioners having their business situs and main offices in the City of New York, and that if the sections of the said statute directed the levying of the taxes on property located outside of the taxing district and the assessments were allowed to stand, the effect would be to render Sections 202, 301 and 307 of Chapter 236 of the Laws of 1918 (now Revised Statutes 1937, Sections 54: 4-1, 54: 4-9 and 54: 4-22), contrary to the 14th Amendment of the United States Constitution, in that it would deprive petitioners of property without due process of law. The State Board of Tax Appeals overruled petitioners' contention and entered judgment [fol. 179] affirming the judgments of the Essex County Board of Taxation and dismissing the petitioners' appeals.

6. Petitioners thereupon appealed to the New Jersey Supreme Court, where the cases of both petitioners were consolidated. The same constitutional question was raised before the New Jersey Supreme Court, to wit, that the busi-

ness situs of petitioners and of the personal property taxed was in the State of New York and, therefore, the City had no jurisdiction to assess petitioners' intangible personal property, and the New Jersey Supreme Court affirmed the judgments of the State Board of Tax Appeals on the ground that the assessments were valid and the application of the statute in holding the assessments valid was not repugnant to the 14th Amendment to the United States Constitution. Thereupon petitioners appealed from the judgment of the New Jersey Supreme Court to the Court of Errors and Appeals in the last resort in all causes in the State of New Jersey, which affirmed the judgment of the New Jersey Supreme Court upon the opinion of the Supreme Court and for the reasons expressed therein.

7. In said cause there is drawn in question the validity of the statutes of the State of New Jersey, to wit, Chapter 236 of the Laws of 1918, Sections 202, 301 and 307 (now Revised Statutes 1937, Sections 54:4-1, 54:4-9 and 54:4-22) on the ground of said statutes, having authorized the taxation of property situate outside of the taxing district, are repugnant to the 14th Amendment of the Constitution of the United States and the final decision and judgment in this cause is in favor of the validity of said statute. The Court of Errors and Appeals, by its decision and judgment, did uphold the right of the City of Newark to levy a tax assessment against the personal property of petitioners under the statute and sections above mentioned, and the construction of said statute as thus applied, is repugnant to the 14th Amendment of the United States Constitution, by depriving petitioners of their property without due process of law, [fol. 180] since the application of the statute allowing such assessments permits the taxation of petitioners' intangible personal property beyond the jurisdiction of the taxing district and at its business situs where it is permanently located and controlled.

Wherefore, petitioners pray for the allowance of an appeal from the judgment and decision of said Court of Errors and Appeals of the State of New Jersey to the Supreme Court of the United States, in order that the decision and judgment of the Court of Errors and Appeals of the State of New Jersey may be examined and reversed, and

prays that a transcript of the record, proceeding and papers in the case, duly authenticated by the Clerk of the Court of Errors and Appeals of the State of New Jersey, be sent to the Supreme Court of the United States, as provided by law, and the errors upon which the petitioners claim to be entitled to appeal are those above stated and more fully set forth in an assignment of errors filed herewith.

Jehiel G. Shipman, John G. Jackson, Attorneys for
and of Counsel with Petitioners-Appellants.

Application for allowance of the appeal made to me this
22d day of August, 1938.

Louis D. Brandeis, Associate Justice.

A True Copy. Thomas A. Mathis, Clerk.

[fol. 181] [File endorsement omitted.]

[fol. 182] IN SUPREME COURT OF THE UNITED STATES

[Title omitted]

ASSIGNMENT OF ERRORS—Filed October 13, 1938

The said Universal Insurance Company and Universal Indemnity Insurance Company assign the following errors in the record and proceeding in said cases:

1. The judgment of the Court of Errors and Appeals of the State of New Jersey was erroneous and illegal in affirming the judgment of the New Jersey Supreme Court and in holding that the assessment levied by the City of Newark, under Sections 202, 301 and 307 of Chapter 236 of the Laws of 1918 (Revised Statutes of 1937, Sections 54:4-1, 54:4-9 and 54:4-22) against the intangible personal property of petitioners for taxes for the year 1935 was a valid assessment, because the business situs of petitioners and of the property taxed, on October 1, 1934, was located in the City and State of New York, beyond the jurisdiction of the taxing district, and the application of the said Sections of the Statute in holding said assessments valid rendered the said Sections of the said Statute repugnant to the 14th Amendment of the Constitution of the United States by depriving petitioners of their property without due process of law.

2. The judgment of the Court of Errors and Appeals of the State of New Jersey was erroneous and illegal in affirming the judgment of the New Jersey Supreme Court and in upholding as valid the assessments levied by the City of Newark against petitioners' intangible personal property under Sections 202, 301 and 307 of Chapter 236 of the Laws of 1918 (Revised Statutes of 1937, Sections 54:4-1, 54:4-9 and 54:4-22) and by so doing said Court did administer the said Sections of the Statute and apply the same so that said Sections of the said Statute were repugnant to the 14th Amendment of the Constitution of the United States and did deprive petitioners of their property without due process of law.

3. The judgment of the Court of Errors and Appeals of the State of New Jersey was erroneous and illegal in affirming the judgment of the New Jersey Supreme Court and in holding that the assessments levied by the City of Newark against the intangible personal property of petitioners for taxation for the year 1935 under Sections 202, 301 and 307 of Chapter 236 of the Laws of 1918 (Revised Statutes of 1937, Sections 54:4-1, 54:4-9 and 54:4-22), were valid, because upon the taxing date, October 1, 1934, said intangible personal property was outside of the jurisdiction of the City of Newark, and the business situs of petitioners and of the taxed intangible personal property was located in the City and State of New York on said date, and the said Court in so holding, did render the said Sections of the said Statutes repugnant to the 14th Amendment of the Constitution and denied the petitioners the equal protection of the laws.

4. The judgment of the Court of Errors and Appeals of the State of New Jersey was erroneous and illegal in affirming the judgment of the New Jersey Supreme Court and in holding valid the assessments levied by the City of Newark against the intangible personal property of the petitioners under Sections 202, 301 and 307 of Chapter 236 of the Laws of 1918 (Revised Statutes of 1937, Sections 54:4-1, 54:4-9 and 54:4-22) because the Court of Errors and Appeals should have reversed the judgment of the Supreme [fol. 184] Court and held that said assessments were invalid under said Statutes, for the reason that the intangible personal property of the petitioners on the taxing date under said Statutes on October 1, 1934, was outside of the juris-

diction of the taxing district of the City of Newark, and because the business situs of the said intangible personal property was located in the City and State of New York on said date, and therefore not subject to taxation by the City of Newark.

Therefore, the appellants come and pray that the judgment rendered against them by the Court of Errors and Appeals of the State of New Jersey, affirming the judgment of the New Jersey Supreme Court, may be reversed, set aside and for nothing holden.

Jehiel G. Shipman, John G. Jackson, Attorneys for
and of Counsel with Petitioners-Appellants.

A True Copy. Thomas A. Mathis, Clerk.

[fol. 185] [File endorsement omitted.]

[fol. 186] IN SUPREME COURT OF THE UNITED STATES

[Title omitted]

ORDER ALLOWING APPEAL—Filed October 13, 1938

The petition of Universal Insurance Company and Universal Indemnity Insurance Company, for an appeal in the above cause to the Supreme Court of the United States, from the judgment of the Court of Errors and Appeals of the State of New Jersey, and the Assignment of Errors filed therewith, and the record of said cause having been considered;

It is Ordered that the appeal be and it is allowed to the Supreme Court of the United States from the judgment of the Court of Errors and Appeals of the State of New Jersey, as prayed in said petition, and that the Clerk of the Court of Errors and Appeals of the State of New Jersey shall prepare and certify a transcript of the record and proceedings in the above cause and transmit the same to the Supreme Court of the United States within 40 days from the date hereof.

It is further Ordered that said Universal Insurance Company and Universal Indemnity Insurance Company shall give good and sufficient security in the sum of \$500 and

[fol. 187] that said appellants shall prosecute said appeal with effect and if said appellants fail to make their plea good, they shall answer all damages and costs.

Dated October 3, 1938.

Louis D. Brandeis, Associate Justice.

A true copy. Thomas A. Mathis, Clerk.

[fol. 188] [File endorsement omitted.]

[fol. 189] Citation, in usual form, showing service on Chas. E. Cook et al., filed October 13, 1938, omitted in printing.

[fols. 190-194] Bond on appeal for \$500.00, approved and filed October 13, 1938, omitted in printing.

[fol. 195] IN SUPREME COURT OF THE UNITED STATES

[Title omitted]

PRAECIPE FOR TRANSCRIPT OF RECORD—Filed October 13, 1938

The following are the portions of the record which are to be incorporated in the transcript to be made by the Clerk and filed with the Clerk of the United States Supreme Court:

1. The petition for appeal.
2. Assignment of Errors.
3. Order allowing appeal.
4. Citation and bond.
5. One copy of the printed state- of the Case in the above entitled cases in the New Jersey Court of Errors and Appeals.
6. Statement of basis of jurisdiction under Rule 12.
7. Proof of acknowledgment of service upon the appellees of copy of the petition, order allowing appeal, assignments of error and statement required by paragraph 1 of Rule 12, and a statement directing attention to paragraph 3 of Rule 12 and proof of service of these papers.

8. Per curiam opinion of the Court of Errors and Appeals [fol. 196] and judgments entered thereon in the above cases.

9. The foregoing Praecipe.

Jehiel G. Shipman, John G. Jackson, Attorneys for
and of Counsel with Petitioners-Appellants.

[fols. 197-199] [File endorsement omitted.]

[fol. 199a] IN COURT OF ERRORS AND APPEALS OF NEW JERSEY

UNIVERSAL INSURANCE COMPANY, Appellant,

vs.

STATE BOARD OF TAX APPEALS OF THE STATE OF NEW JERSEY
and THE CITY OF NEWARK, Respondents

UNIVERSAL INDEMNITY INSURANCE COMPANY, Appellant,

vs.

STATE BOARD OF TAX APPEALS OF THE STATE OF NEW JERSEY
and THE CITY OF NEWARK, Respondents

Argued February 4, 1938. Decided April 29, 1938

On Appeal from the Supreme Court, Whose Opinion is
Reported in 118 N. J. L. 538

For the Appellants, Child, Riker, Marsh & Shipman.

For the Respondents, John A. Matthews.

OPINION—Filed April 29, 1938

Per CURIAM:

The judgment under review herein should be affirmed, for the reasons expressed in the opinion delivered by Mr. Justice Perskie in the Supreme Court.

For affirmance—The Chancellor, Chief Justice, Parker, Case, Donges, Hetfield, Dear, Wells, WolfsKeil, Rafferty, Walker, JJ. 11.

For reversal—None.

For reversal as to second and fourth points—Case, Hetfield, Walker, JJ. 3.

[fol. 200] IN COURT OF ERRORS AND APPEALS OF NEW JERSEY

UNIVERSAL INSURANCE COMPANY, Appellant,

VS.

STATE BOARD OF TAX APPEALS OF THE STATE OF NEW JERSEY
and THE CITY OF NEWARK, Respondents

UNIVERSAL INDEMNITY INSURANCE COMPANY, Appellant,

VS.

STATE BOARD OF TAX APPEALS OF THE STATE OF NEW JERSEY
and THE CITY OF NEWARK, Respondents

On Appeal

ORDER OF AFFIRMANCE AND REMITTITUR TO SUPREME COURT

The above entitled causes having been duly argued at the February term, 1938, of this court by Jehiel G. Shipman, of counsel for the appellants, and Andrew B. Crummy, of counsel for the respondent, City of Newark, and the court having considered the same, and finding no error in the record of proceedings in the Supreme Court,

It is, thereupon, on this 29th day of April, in the year of Our Lord One Thousand Nine Hundred and Thirty-eight, Ordered and Adjudged that the judgment of the Supreme Court reviewed by the appeal in this cause, be affirmed with costs; and that the record be remitted to the Supreme Court to be proceeded with in accordance with this judgment and the practice of said court.

On motion of Jno. A. Matthews, Special Counsel to City of Newark.

A True Copy. Thomas A. Mathis, Clerk.

Endorsed: "Filed May 31, 1938, Thomas A. Mathis, Clerk."

[fol. 201] Clerk's certificate to foregoing transcript omitted in printing.

[fol. 202] IN SUPREME COURT OF THE UNITED STATES

STATEMENT OF POINTS ON WHICH APPELLANTS INTEND TO
RELY AND DESIGNATION OF PARTS OF RECORD, NECESSARY FOR
THE CONSIDERATION THEREOF, TO BE PRINTED—Filed No-
vember 2, 1938

The appellants intend to rely upon the following points
upon the argument of the above entitled cases:

1. The judgment of the Court of Errors and Appeals of the State of New Jersey was erroneous and illegal in affirming the judgment of the New Jersey Supreme Court, and in holding valid the assessments for personal property taxes for the year 1935, levied by the City of Newark, under Sections 202, 301, 305 and 307 of Chapter 236 of the Session Laws of 1918 of the State of New Jersey (Revised Statutes of New Jersey of 1937, Sections 54:4-1, 54:4-9 and 18 and 54:4-22) against the intangible personal property of appellants, constituting appellants' capital stock paid in and accumulated surplus, because the business situs of appellants and of the intangible personal property assessed and taxed, was on the assessing and taxing date, October 1, 1934 and at all times has been located in the City and State of New York, beyond the jurisdiction of the taxing district of the City of Newark, and the application of the said Sections of the Statute in holding said assessments valid, rendered the said Sections of the said Statute repugnant to the 14th Amendment of the Constitution of the United States, de-[fol. 202a] priving appellants of their property without due process of law and denying the appellants equal protection of the laws.

2. The judgment of the Court of Errors and Appeals of the State of New Jersey was erroneous and illegal in affirming the judgment of the New Jersey Supreme Court, and in holding valid the assessments for personal property taxes for the year 1935, levied by the City of Newark against the intangible personal property of appellants, constituting appellants' capital stock paid in and accumulated surplus, under Sections 202, 301, 305 and 307 of Chapter 236 of the Session Laws of 1918 of New Jersey (Revised Statutes of New Jersey of 1937, Sections 54:4-1, 54:4-9 and 18 and 54:4-22), because upon the assessing and taxing date, October 1, 1934, said intangible personal property was, and at all times has been, outside of the jurisdiction of the taxing

district of the City of Newark, and the business situs of appellants and of said taxed intangible personal property was on said date, and at all times has been, located in the City and State of New York, outside of said taxing district, and the said Court in so holding said assessments valid, did administer and apply the said Sections of the said Statute so as to render them repugnant to the 14th Amendment of the Constitution of the United States, depriving appellants of their property without due process of law, and denying the appellants the equal protection of the laws.

The following are the parts of the record which appellants designate as necessary for the consideration of the points upon which appellants intend to rely:

1. The petition for appeal.
2. Assignment of Errors.
3. Order allowing appeal.
4. Citation and bond.
5. The following parts of the printed State of the Case used in the above cases in the New Jersey Court of Errors and Appeals:
 - (a) Pages 1 to 11, both inclusive.
 - (b) Pages 15 to 20, both inclusive.
 - (c) Pages 42 to 58, both inclusive.
 - (d) Judgment of the State Board in the appeal of the Universal Indemnity Insurance Company on page 62, line 10, to page 63, line 30.
 - [fol. 202b]; (e) Pages 68 to 87, both inclusive.
 - (f) Pages 137 to 148, both inclusive.
6. Per Curiam opinion of the Court of Errors and Appeals.
7. Judgment of the Court of Errors and Appeals.
8. Proof of acknowledgment of service upon the appellees of copy of the petition, order allowing appeal, assignments of error and statement required by paragraph 1 of Rule 12, and notice directing attention to paragraph 3 of Rule 12.
9. Praecipe.

Respectfully yours, Jehiel G. Shipman, John G. Jackson, Attorneys for and of Counsel with Petitioners-Appellants.

Dated November 1, 1938.

To State Board of Tax Appeals and City of Newark.

[fol. 202c] Service of a copy of the within Statement and Designation is hereby acknowledged this 1st day of November, 1938.

Chas. E. Cook, State Board of Tax Appeals of the State of New Jersey. James F. X. O'Brien, Corp. Counsel, City of Newark.

[fol. 202d] [File endorsement omitted.]

[fol. 203] IN SUPREME COURT OF THE UNITED STATES

STIPULATION OF ADDITIONAL PARTS OF THE RECORD NECESSARY FOR CONSIDERATION OF THE POINTS ON WHICH THE APPELLANTS INTEND TO RELY—Filed November 19, 1938

It is hereby Stipulated and Agreed between the Appellants and the Respondents, by their respective counsel, that the following parts of the printed state of the case used in the above cases in the New Jersey Court of Errors and Appeals, are necessary for consideration of the points upon which the appellants intend to rely, in addition to those parts of the record designated by the appellants in the Statement of Points and Designation of Parts of the Record, filed by appellants on November 2, 1938:

Pages 12 to 14, both inclusive, and pages 59 to 61, both inclusive, and pages 88, 111 and 112, of the printed state of the case used in the New Jersey Court of Errors and Appeals.

Dated November 12, 1938.

Jehiel G. Shipman, Attorney for and of Counsel with Appellants. James F. X. O'Brien, Attorney for and of Counsel with Respondent, City of Newark. State Board of Tax Appeals of the State of New Jersey, by Chas. E. Cook, Secretary.

[fol. 204] [File endorsement omitted.]

Endorsed on cover: File No. 42,941. New Jersey, Court of Errors and Appeals. Term No. 456. Universal Insurance Company and Universal Indemnity Insurance Company, appellants, vs. State Board of Tax Appeals of the State of New Jersey and The City of Newark. Filed November 2, 1938. Term No. 456, O. T., 1938.

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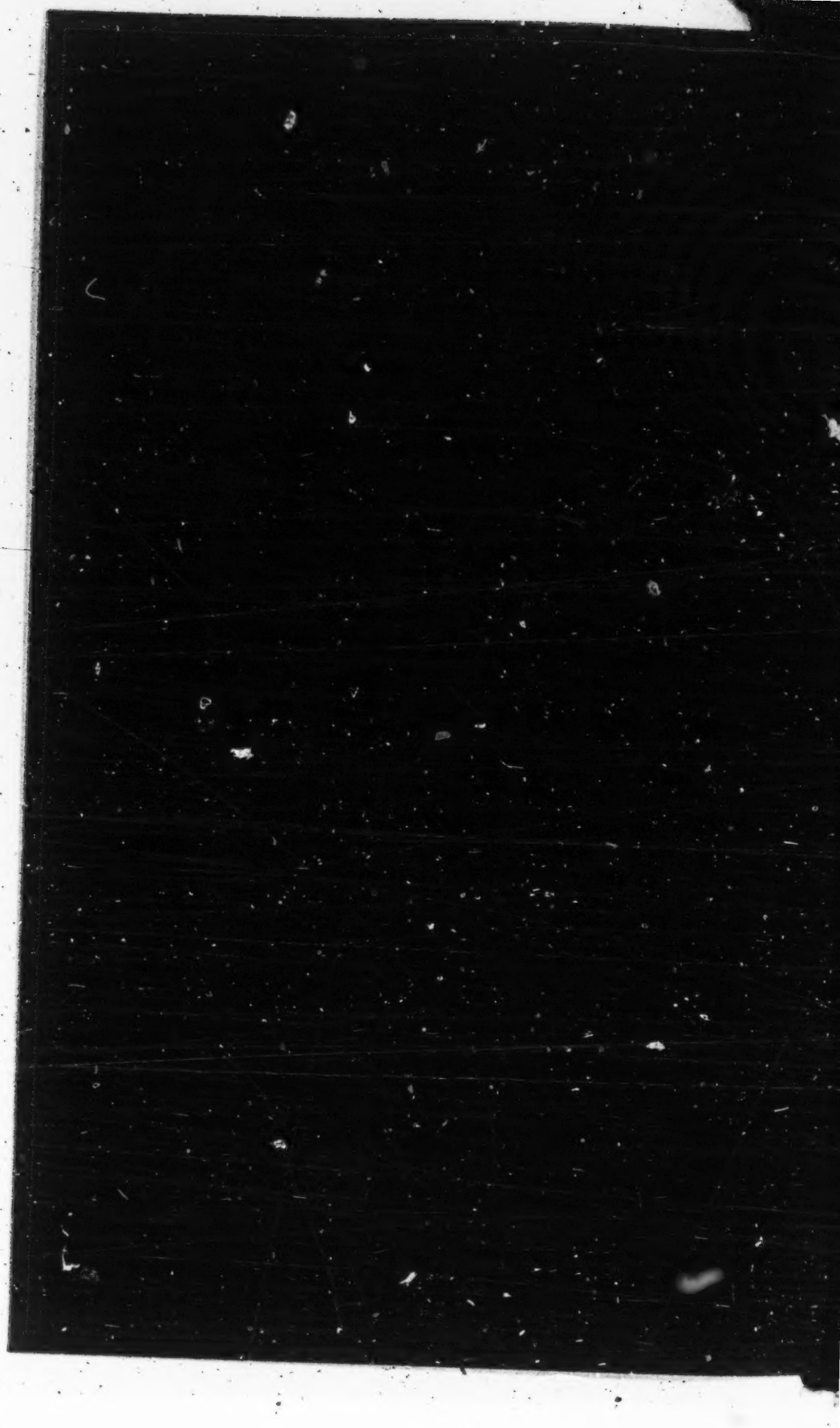
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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1938

No. 449

NEWARK FIRE INSURANCE COMPANY,
Prosecutor-Appellant,

vs.

**STATE BOARD OF TAX APPEALS AND THE CITY
OF NEWARK, A MUNICIPAL CORPORATION OF THE STATE
OF NEW JERSEY,**

Defendants-Respondents.

**STATEMENT OF BASIS OF JURISDICTION OF THE
SUPREME COURT.**

Petitioner contends that the basis upon which the Supreme Court of the United States has jurisdiction to review the judgment of the Court of Errors and Appeals of the State of New Jersey is:

1. The statutory provisions sustaining the jurisdiction are found in Title 28, U. S. Code, Section 344 (a), pp. 205, 206 (Act of February 13, 1925, c. 229, Section 1, 43 Stat. 937):

“A final judgment or decree in any suit in the highest court of a State in which a decision in the suit could

be had, where is drawn in question the validity of a treaty or statute of the United States, and the decision is against its validity; or where is drawn in question the validity of a statute of any State on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, and the decision is in favor of its validity, may be reviewed by the Supreme Court upon a writ of error. The writ shall have the same effect as if the judgment or decree had been rendered or passed in a court of the United States. The Supreme Court may reverse, modify, or affirm the judgment or decree of such State court, and may, in its discretion, award execution or remand the cause to the court from which it was removed by the writ."

and in Title 28, U. S. Code, Sections 861 (a) and 861 (b) Act of January 31, 1928, c. 14, Section 1, 45 Stat. 54; Act of April 26, 1928, c. 440, 45 Stat. 466:

"861 (a). Writ of error abolished; substitution of appeal. The writ of error in cases, civil and criminal, is abolished. All relief which heretofore could be obtained by writ of error shall hereafter be obtainable by appeal."

"861 (b). Statutes governing writs of error to apply to appeals. The statutes regulating the right to a writ of error, defining the relief which may be had thereon, and prescribing the mode of exercising that right and of invoking such relief, including the provisions relating to costs, supersedeas, and mandate, shall be applicable to the appeal which section 861a of this title substitutes for a writ of error."

2. The statute of the State of New Jersey, the validity of which is here involved, is Chapter 236 of the Laws of 1918, Section 202, p. 848:

"All property, real and personal, within the jurisdiction of this State, not expressly exempted by this act or excluded from its operation, shall be subject to taxa-

tion annually under this act at its true value, and shall be valued by the assessors of the respective taxing districts. Property omitted by the assessors may be assessed as hereinafter provided. All property shall be assessed to the owners thereof with reference to the amount owned on the first day of October in each year, and the persons so assessed for personal property shall be personally liable for the taxes thereon."

Chapter 236 of the Laws of 1918, Section 301, p. 853, as amended by Chapter 310 of the Laws of 1920:

"The tax on all tangible personal property in this State and on all taxable personal property of non-residents of this State shall be assessed in and for the taxing district where such property is found. The tax on other personal property shall be assessed on each inhabitant in the taxing district where he resides on the first day of October in each year. Personal property in the possession or under the control of any person as trustee, guardian, executor or administrator, shall be assessed in his name, as such, separate from his individual assessment, or in the name of any one of several joint trustees, guardians, executors or administrators, if the one of them having actual control or possession cannot be ascertained by the assessor; but the personal property belonging to the estate of any decedent shall be assessed in the taxing district wherein the decedent resided at the time of his death, except such part of the tangible property thereof as may be actually located in some other taxing district in this State and assessed therein."

Chapter 236 of the Laws of 1918, Section 307, p. 858:

"Every fire insurance company and every stock insurance company other than life insurance shall be assessed in the taxing district where its office is situate, upon the full amount of its capital stock paid in and accumulated surplus; the real estate belonging to every such corporation, however, shall be taxed in the taxing

district where such real estate is situated, and the amount of assessment upon said real estate shall be deducted from the amount of any assessment made upon the capital stock and accumulated surplus, as herein provided for; no franchise tax shall be imposed upon any such fire insurance company or other stock insurance company included in this section."

These sections were in effect at the time that this tax was levied but have since been revised and are now found in Revised Statutes of New Jersey, Sections 54:4-1, 54:4-9 and 54:4-22:

"54:4-1. Property subject to tax; date of assessment. All property, real and personal, within the jurisdiction of this state not expressly exempted from taxation or expressly excluded from the operation of this chapter shall be subject to taxation annually under this chapter at its true value, and shall be valued by the assessors of the respective taxing districts. Property omitted by the assessors may be assessed as herein-after provided. All property shall be assessed to the owner thereof with reference to the amount owned on October first in each year, and the person so assessed for personal property shall be personally liable for the taxes thereon."

"54:4-9. Personal property; where assessed. The tax on all tangible personal property in this state and on all taxable personal property of non-residents of this state, except as otherwise provided in this title, shall be assessed in and for the taxing district where the property is found. The tax on other personal property shall be assessed on each inhabitant in the taxing district where he resides on October first in each year."

54:4-22—same as Section 307 quoted above.

The question raised before the Court of Errors and Appeals and before the Supreme Court and the Tax Boards was the construction and validity of the sections of the stat-

utes quoted on the ground that said statutes as construed and applied were repugnant to the 14th Amendment to the Constitution of the United States, and it is now contended that the judgment and decision of the Court of Errors and Appeals is in favor of the validity of the said sections of the statute as construed and applied, and therefore that judgment and decision may be reviewed by the Supreme Court by appeal.

3. The judgment of the Court of Errors and Appeals of the State of New Jersey here sought to be reviewed was entered on May 31, 1938, and the date upon which the application for the appeal was presented was August 19, 1938.

4. The question involved in this cause is whether the New Jersey tax statutes quoted above, as construed and applied by the courts of that State, imposing a personal property tax upon the intangible personal property of a domestic fire insurance corporation having its business *situs* and commercial domicile in another State, are repugnant to the 14th Amendment of the Constitution of the United States in depriving the appellant of its property without due process of law.

This question was first raised informally before the Essex County Board of Taxation, but that Board rendered no formal opinion thereon other than to affirm the assessment.

Upon appeal to the State Board of Tax Appeals a hearing *de novo* was had. The attorneys of the parties by stipulation (S. C., p. 22) there agreed upon the essential facts. The appellant there urged that only the State of the business *situs* had jurisdiction to tax intangible personal property, but the Board held that the State of the residence of the owner also had jurisdiction to tax. It held (S. C., p. 13):

"It is apparent that intangible personal property which has acquired a business *situs* in a state other

than that of the owner, may be taxed both in the state where it has acquired a business *situs* and in the state of residence of the owner."

A copy of the opinion of the State Board is attached hereto.

Appellant sought a review of this decision by the Supreme Court of New Jersey by certiorari. On certiorari the appellant assigned as reasons for setting aside the State Board's judgment the error of the State Board in holding that the City of Newark and the State of New Jersey had jurisdiction to tax the intangible personal property of the appellant, where the appellant had its business *situs* in another State (S. C., p. 25).

The Supreme Court of New Jersey considered the question again and in its opinion, reported in 118 N. J. L. 525, a copy of which is attached hereto, held (S. C., p. 35, 118 N. J. L. 526):

"This question must, in light of the proofs, be considered upon the inescapable premise that prosecutor had its business *situs* as of October 1, 1934, and still has it, in New York; that the securities, the personality involved, have become an integral part of its business *situs* in New York; but that prosecutor pays no personal property tax to the State of New York.

"It is fundamental that jurisdiction to tax depends primarily on the type of tax sought to be exacted and the property that is subject to the tax. Here the tax, under the act, is a personal property tax."

The Supreme Court of New Jersey held that the tax as construed and applied, imposing a personal property tax upon the intangible personal property of a domestic corporation, which corporation and property had a business *situs* in another State, was valid and did not violate the 14th Amendment of the Constitution of the United States by

depriving such corporation of its property without due process of law.

Upon appeal the question was presented and argued to the Court of Errors and Appeals of New Jersey, which after consideration affirmed the judgment of the Supreme Court by a *per curiam* opinion, reported in 120 N. J. L. 224; and a copy of which is attached hereto, adopting the opinion of the Supreme Court.

Before each of the tax boards and each of the appellate courts appellant urged that the taxing statutes quoted above as construed and applied deprived it of its property in violation of the 14th Amendment of the Constitution of the United States and without due process of law. Each of the tax boards and each of the appellate tribunals considered this question and decided it adversely to the appellant. The determination of this question in appellant's favor would have been a holding that there was no jurisdiction to tax and would have been dispositive of the whole case.

Decisions of the Supreme Court of the United States which sustain the jurisdiction of the Supreme Court of the United States to review this cause upon appeal are: *Wheeling Steel Corporation v. Fox*, 298 U. S. 193; *First Bank Stock Corporation v. Minnesota*, 301 U. S. 234; *Safe Deposit and Trust Company of Baltimore v. Virginia*, 280 U. S. 83; *Fiske v. State of Kansas*, 274 U. S. 380; *Fox River Paper Company v. Railroad Commission*, 274 U. S. 651; *Myles Salt Company v. Board of Commissioners*, 239 U. S. 478; and *Great Northern Railway Co. v. State of Minnesota*, 278 U. S. 503.

The tax boards and the Supreme Court, and the Court of Errors and Appeals relied upon two decisions of this Court, *Cream of Wheat Company v. County of Grand Fork*, 253 U. S. 325, and *Union Refrigerator Transit Company v. Kentucky*, 199 U. S. 194. These cases support the theory that intangible personal property may be taxed by both the State

of the business *situs* and by the State of the domicile. On this point, however, both cases followed *Blackstone v. Miller*, 188 U. S. 189, which was expressly overruled in *Farmers Loan & Trust Company v. Minnesota*, 280 U. S. 204. The opinion in this last case contained *dicta* suggesting that intangible personal property should be accorded the same immunity against double taxation as tangible personal property.

An attempt was made to raise the question in *First National Bank v. Maine*, 284 U. S. 312, but the Court held (284 U. S. 331):

"We do not overlook the possibility that shares of stock, as well as other intangibles, may be so used in a state other than that of the owner's domicile as to give them a *situs* analogous to the actual *situs* of tangible personal property. See *Farmers' Loan & T. Co. case*, *supra* (280 U. S. 213, L. ed. 375, 65 A. L. R. 1000, 50 St. Ct. 98). That question heretofore has been reserved and it still is reserved to be disposed of when, if ever, it properly shall be presented for our consideration."

In *Wheeling Steel Corporation v. Fox*, 298 U. S. 193, this Court held that the intangible personal property of a Delaware corporation was within the taxing jurisdiction of the State of West Virginia where it had its business *situs* or commercial *situs*, and once more found no sufficient reason for saying that intangibles are not entitled to enjoy an immunity against taxation at more than one place similar to that accorded to tangibles.

In *People of the State of New York ex rel Whitney v. Graves et al.*, 299 U. S. 366, and in *First Bank Stock Corp. v. State of Minnesota*, 301 U. S. 234, this Court has again affirmed that the State of the business *situs* has jurisdiction to tax intangibles.

Under the law as set forth in these cases it is clear that the intangible personal property of the appellant are within the tax jurisdiction of the State of New York where it has its commercial domicile. If intangible personal property is to be accorded the immunity now given to tangible personal property, the conclusion is inescapable that the intangible personal property of this appellant is not within the tax jurisdiction of the State of New Jersey. The failure of the State of New York to exercise its jurisdiction to tax cannot confer jurisdiction upon New Jersey. *Buck v. Beach*, 206 U. S. 392; *Commonwealth v. West India Oil Company*, 138 Ky. 828 (1910); *Miami Coal Company v. Fox*, 203 Ind. 99 (1931); *Smith v. Ajax Pipe Line Co.*, 87 F. (2d) 567, certiorari denied 300 U. S. 677.

ARTHUR T. VANDERBILT,
Attorney for Appellant.

Dated August 19, 1938.

EXHIBIT "A".**STATE BOARD OF TAX APPEALS, STATE OF NEW JERSEY.****NEWARK FIRE INSURANCE COMPANY, *Appellant*,****v.****CITY OF NEWARK, *Respondent*.****Opinion.****Filed July 7, 1936.**

In the matter of the application for cancellation, and in the alternative, for reduction of a personal property tax upon capital stock and accumulated surplus of Newark Fire Insurance Company, a New Jersey corporation claiming to have a business *situs* in New York.

Appearances:

For Appellant, Arthur T. Vanderbilt, Esq.

For Respondent, Frank A. Boettner, Esq., by John A. Matthews, Esq.

WEAVER, President:

The appellant, Newark Fire Insurance Company, is a corporation organized under the laws of the State of New Jersey, having its registered office at Newark, New Jersey. Its main business and executive office is located in New York City. All books of the company, except those required by law to be kept in this State, are retained in its New York office, where its general accounts are kept. With the exception of a small deposit in New Jersey, all of its cash and securities are in banks located in New York City. For the past six years, the general affairs of the company have been conducted from the New York office, the only business carried on from its registered office in Newark being a local or regional claim and underwriting department.

The Board of Assessors of the City of Newark levied upon the company's capital and accumulated surplus a personal property assessment in the sum of \$1,069,000, which assessment was affirmed by the Essex County Board of Taxation on appeal. Appellant seeks to have this assessment cancelled, or in the alternative reduced, upon the following grounds:

1. The business *situs* of the company is in the City of New York:

2. (a) That reserves for unearned premiums, (b) reserves for taxes, and (c) agency balances over 90 days old, should not be included in its capital and accumulated surplus, thereby reducing the capital and accumulated surplus by the amounts represented by said items, and that after the deduction of property claimed to be exempt no taxable capital or accumulated surplus remains.

3. That cash on hand or on deposit is exempt and should be deducted from its taxable capital and accumulated surplus.

The company is taxable under Section 307 of the General Tax Act, P. L. 1918, p. 858, which provides:

"Every fire insurance company and every stock insurance company other than life insurance shall be assessed in the taxing district where its office is situate, upon the full amount of its capital stock paid in and accumulated surplus; the real estate belonging to every such corporation, however, shall be taxed in the taxing district where such real estate is situated, and the amount of assessment upon said real estate shall be deducted from the amount of any assessment made upon the capital stock and accumulated surplus, as herein provided for; no franchise tax shall be imposed upon any such fire insurance company or other stock insurance company included in this section."

Appellant's claim that it is not taxable in this State because its personal property and business *situs* are located in New York is without merit.

The company is incorporated under the Insurance Companies Act of this State (2 C. S. p. 2839), Section 3 of which provides that its certificate of incorporation shall contain,—

“The place where the principal office of said company is said to be located and its general business conducted, which shall be within this State,”

This provision has been carried into the amendment of 1929, —Chapter 6, page 18. The appellant accordingly is required to maintain its principal office and carry on its general business within the State of New Jersey.

Section 305 of the General Tax Act, P. L. 1918, p. 856, provides that:

“Corporations of this State shall be regarded as residents and inhabitants of the taxing district where their chief office is located, and their personal property shall be taxed the same as that of an individual, except as in this act otherwise provided;”

In *Union Refrigerator Transit Company v. Kentucky*, 199 U. S. 194, the United States Supreme Court said:

“ there is an obvious distinction between the tangible and intangible property, in the fact that the latter is held secretly; that there is no method by which its existence or ownership can be ascertained in the State of its *situs*, except perhaps in the case of mortgages or shares of stock. So if the owner be discovered, there is no way by which he can be reached by process in a State other than that of his domicile, or the collection of the tax otherwise enforced. In this class of cases the tendency of modern authorities is to apply the maxim *mobilia sequuntur personam*, and to hold that the property may be taxed at the domicile of the owner as the real *situs* of the debt, and also, more particularly in the case of mortgages, in the State where the property is retained. Such has been the repeated rulings of this court. *Tappan v. Merchants' National Bank*, 19 Wall. 490; *Kirtland v. Hotchkiss*, 100 U. S. 491; *Bona parte v. Tax Court*, 104 U. S. 592; *Sturges v. Carter*, 114

U. S. 511; *Kidd v. Alabama*, 188 U. S. 730; *Blackstone v. Miller*, 188 U. S. 189.

"If it occasionally results in double taxation, it much oftener happens that this class of property escapes altogether. In the case of intangible property, the law does not look for absolute equality, but to the much more practical consideration of collecting the tax upon such property, either in the State of the domicile or the *situs*."

In the case of *Cream of Wheat Company v. County of Grand Forks*, 253 U. S. p. 325, the United States Supreme Court held that the limitation of the Fourteenth Amendment upon the power of a State to tax the property of its residents which has acquired a permanent *situs* outside of the State does not apply to intangible property, even though it has acquired a business *situs* and is taxable in another State. In that case the Court said:

"The company was confessedly domiciled in North Dakota; for it was incorporated under the laws of that State. As said by Mr. Chief Justice Taney, 'It must dwell in the place of its creation, and cannot migrate to another sovereignty.' *Bank of Augusta v. Earle*, 13 Pet. 519, 588. The fact that its property and business were entirely in another State did not make it any the less subject to taxation in the State of its domicile. The limitation imposed by the Fourteenth Amendment is merely that a State may not tax a resident for property which has acquired a permanent *situs* beyond its boundaries. . . . The limitation upon the power of taxation does not apply even to tangible personal property without the State of the corporation's domicile if, like a sea-going vessel, the property has no permanent *situs* anywhere. *Southern Pacific Co. v. Kentucky*, 222 U. S. 63, 68. Nor has it any application to intangible property, *Union Refrigerator Transit Co. v. Kentucky*, *supra*, p. 205; *Hawley v. Malden*, 232 U. S. 1, 11, even though the property is also taxable in another state by virtue of having a 'business *situs*' there. *Fidelity & Columbia Trust Co. v. Louisville*, 245 U. S. 54, 59."

In *Maguire v. Trefry*, Tax Commissioner of Commonwealth of Massachusetts, 253 U. S. 12, 16, the United States Supreme Court said:

"In *Fidelity & Columbia Trust Company v. Louisville*, 245 U. S. 54, we held that a bank deposit of a resident of Kentucky in the bank of another State, where it was taxed, might be taxed as a credit belonging to the resident of Kentucky. In that case *Union Refrigerator Transit Co. v. Kentucky*, *supra*, was distinguished, and the principle was affirmed that the State of the owner's domicile might tax the credits of a resident although evidenced by debts due from residents of another State. This is the general rule recognized in the maxim '*bonilia sequuntur personam*,' and justifying, except under exceptional circumstances, the taxation of credits and beneficial interest in property at the domicile of the owner."

In the case of *Citizens National Bank of Cincinnati v. Burr*, 257 U. S. 99, the United States Supreme Court held that a membership in the New York Stock Exchange held by a resident of Ohio was a property right, intangible in its nature, and that whether it was subject to taxation by Ohio taxing laws was a question of State law, determinable by the State Court. In that case the Court said:

"Exemption from double taxation by one and the same State is not guaranteed by the Fourteenth Amendment (*St. Louis Southwestern Ry. Co. v. Arkansas*, 235 U. S. 350, 367-368); much less is taxation by two States upon identical or closely related property interests falling within the jurisdiction of both, forbidden. *Kidd v. Alabama*, 188 U. S. 730, 732; *Hawley v. Malden*, 232 U. S. 1, 13; *Fidelity & Columbia Trust Co. v. Louisville*, 245 U. S. 54, 58."

It is apparent that intangible personal property which has acquired a business *situs* in a State other than that of the owner, may be taxed both in the State where it has acquired a business *situs* and in the State of residence of the owner. The proofs establish that the company pays no per-

sonal property tax in the State of New York, and is now seeking to escape taxation in the State of New Jersey.

The Board concludes that appellant is subject to taxation upon its capital stock and accumulated surplus in the State of New Jersey.

The company's reserve for unearned premiums cannot be deducted as a liability from its capital and accumulated surplus. In *Inhabitants of the City of Trenton v. Standard Fire Insurance Co. of New Jersey*, 77 N. J. L. 757; 73 A. 606, the Court of Errors and Appeals held that the reserve for unearned premiums is not exempt from taxation and cannot be deducted from the gross assets to ascertain the capital and accumulated surplus. The Court said:

"This description is more applicable to an asset of the company set apart on its books to an amount equal to the cancellation value of its policies than it is to define a liability or debt. The fund is in the possession and control of the company, is invested by it in interest-bearing securities, and the profits yielded are substantial, and inure to the corporation. It seems not to be held on any trust, nor is it chargeable with any liability, other than that with which the capital and surplus are charged. It is a part of the surplus reserved from dividends. It may never be called upon to provide for the reinsurance of the company's risks or pay losses. . . .

"The question arises, then, should the reserve fund be counted as a liability? In the case of *People's Fire Ins. Co. v. Parker, Receiver*, 34 N. J. Law 479, affirmed 35 N. J. Law, 575, it was held by this court that the term 'accumulated surplus', in its application to stock companies, is well understood to refer to the fund they have in excess of their capital and liabilities, and that the word 'liabilities' there used means fixed liabilities, not contingent, citing *State v. Uttor*, 34 N. J. Law, 493. An assessment, levied against the unearned premiums as a part of the accumulated surplus of the company, was in that case affirmed. The liabilities and losses upon policies issued and unexpired is not a fixed and definite liability, but merely contingent, and as such it should not be deducted from the gross assets in order to ascertain the capital stock and accumulated surplus."

The appellant claims that the sum of \$71,765.65, set aside as a reserve for Federal taxes, is deductible from the assets in determining the amount of capital stock and accumulated surplus. The City claims that this is not a debt and should not be deducted. In ascertaining the amount of the capital stock and accumulated surplus, it is necessary to deduct from the assets, not only debts but also liabilities. While a tax is not a debt, it is a fixed liability and should therefore be deducted.

Appellant's claim for deduction of \$119,109.72, representing agency balances over ninety days old, cannot be allowed, as this item represents neither debts nor liabilities. It is carried on the books of the company as an asset.

Appellant claims that the portion of its capital and accumulated surplus, representing cash on hand or on deposit, in the sum of \$532,784.54, is exempt from assessment, by virtue of Chapter 165, Laws of 1933.

If cash on hand or on deposit owned by an individual taxpayer is exempt from taxation, appellant is entitled to deduct it from its capital stock paid in and accumulated surplus, as corporations which are taxable upon the amount of capital stock paid in and accumulated surplus are entitled to deduct therefrom the securities (or property) which are exempt in the hands of individuals. *Newark City Bank v. Assessor of the 4th Ward of the City of Newark*, 30 N. J. L. 13. It therefore becomes necessary to determine whether the statute exempts the cash and deposits in bank of an individual taxpayer.

Chapter 165 of the Laws of 1933, which is an amendment to Section 203 of the General Tax Act of 1918, provides for the exemption of—

“Cash on hand or on deposit and loans on collateral of savings banks, mutual savings banks and institutions for savings organized under the laws of this State.”

The statute is ambiguous and is susceptible to two constructions,—one that cash on hand or on deposit owned by anyone is exempt, and that loans on collateral of savings banks, mutual savings banks and institutions for savings are exempt. The other construction is that cash on hand or on

deposit in the various institutions mentioned in the Act, or cash of the institutions on deposit and loans on their collateral are exempt, in which case the exemption is limited to the institutions mentioned in the Act. If the latter construction be accepted,—that only cash on hand of the various institutions mentioned in the Act, and their deposits, are exempt, then the Act would be unconstitutional. *Tippett v. McGrath*, Col., 70 N. J. L. 110; 56 A. 134; affirmed 71 N. J. L. 338; 59 A. 1118; *Essex County Park Commission v. Town of West Orange*, 77 N. J. L. 575; 73 A. 511.

Where an Act is susceptible to two constructions,—one making the Act constitutional and the other making it unconstitutional,—the courts have held that the construction which makes the Act constitutional must be accepted, for the reason that it must be inferred that the Legislature intended to pass a constitutional act. *State (Fidelity Trust Co.) v. Vogt*, 66 N. J. L. 86; 48 A. 580; *Commercial Trust Co. of N. J. v. Hudson County Board of Taxation*, 86 N. J. L. 424; 92 A. 263. Following this construction, it is necessary to hold that cash on hand or on deposit is exempt, without regard to ownership.

After allowing the items for which the company is entitled to either deduction or exemption, a taxable capital and accumulated surplus remains, in excess of the assessment as made.

For the reasons stated, the appeal is dismissed.

EXHIBIT "B".**SUPREME COURT, STATE OF NEW JERSEY.****NEWARK FIRE INSURANCE COMPANY, *Prosecutor,******v.*****STATE BOARD OF TAX APPEALS and CITY OF NEWARK, a
Municipal Corporation of the State of New Jersey,
*Respondents.*****Opinion.****On Certiorari.****Before Justices Bodine, Heher and Perskie.****For the prosecutor, Arthur T. Vanderbilt.****For the respondents, Frank A. Boettner and John A. Matthews.****The opinion of the court was delivered by PERSKIE, J.:**

The question before us concerns the validity of the personal property assessment made by the City of Newark on October 1st, 1934, for the year 1935 against prosecutor. The assessment was made in accordance with our General Tax act. *Pamph. L. 1918, p. 858, par. 307 as amended.*

Prosecutor is a general fire insurance company organized under the laws of this state with its registered office at 31 Clinton Street, in the city of Newark. For six years prior to the assessment its main and executive offices have been and now are at 150 William Street, in the City of New York. Prosecutor's general business is conducted in New York, and all the books of the company, except those required by law to be kept at its registered office in New Jersey, are located there. Although a small amount of cash and some few securities are kept in New Jersey so that business may be done here, the great majority of these items is either in the New York offices or in banks in that state. The business conducted at the Newark office is confined to local re-

gional underwriting and the adjustment of claims arising therefrom. Reports on such business are sent to the main office in New York. The record also discloses that prosecutor pays no personal property tax in New York, and, for aught that appears, no such tax is exacted by that state.

The state board of tax appeals affirmed the assessment as made by the taxing authorities of Newark thereby assessing the intangible property owned by prosecutor. This court granted certiorari and prosecutor argues that the assessment as made should be reduced because (1) New Jersey has no jurisdiction to tax the intangibles; and (2) because it was error to include the item of unearned premium reserve as a taxable asset.

First. As to jurisdiction to tax prosecutor in this state. This question must, in light of the proofs, be considered upon the inescapable premise that prosecutor had its business *situs* as of October 1st, 1922, and still has it, in New York; that the securities, the personalty involved, have become an integral part of its business *situs* in New York; but that prosecutor pays no personal property tax to the State of New York.

It is fundamental that jurisdiction to tax depends primarily on the type of tax sought to be exacted and the property that is subject to the tax. Here the tax, under the act, is a personal property tax. The property subject to the tax constitutes securities which represent paid in capital stock and accumulated surplus of the company. Such securities are clearly intangibles. It is well settled that intangible personalty is taxable at the domicile of the owner. *Kirtland v. Hotchkiss*, 100 U. S. 491; *Blodgett v. Silberman*, 277 Id. 1; *Farmers Loan and Trust Co. v. Minnesota*, 280 Id. 204. That principle finds its support in the legal maxim *mobilia sequuntur personam*. The use of this maxim like the use of most other maxims in jurisprudence, is not the solution of the problem; it is merely a formal and unexplanatory statement of a legal conclusion. Cf. 9 *Harvard Law Review* 13; 8 *Am. L. Rev.* 519. Thus frequently its use is not very helpful. But since contrary to the case of tangibles, intangibles have no actual *situs*, are not physically under the definite control of any one jurisdiction, the

rule is embraced in the maxim developed and is justified even to this day as a rule of convenience. Convenience, however, brings hardship. So it was not long before exceptions to the general rule as stated gradually found and worked themselves into the law. Thus it has been held that where intangible personal property became an integral part of a business carried on in a state other than that of the domicile of the owner of the intangibles, then that other state, the state wherein the intangibles acquired a "business situs," had jurisdiction to levy a personal property tax upon these intangibles. *New Orleans v. Stempel*, 175 U. S. 309; *Metropolitan Life Insurance Company of New York v. New Orleans*, 205 Id. 395; *Wheeling Steel Corp. v. Fox*, 298 Id. 193; *Safe Deposit and Trust Co. v. Virginia*, 280 Id. 183; *Farmers Loan and Trust Co. v. Minnesota*, 280 Id. 204; *First National Bank of Boston v. Maine*, 284 Id. 312; see 76 A. L. R. 806. Conceding the application of this exception to the general rule, the problem soon arose as to whether, when the "business situs" theory did apply, the state of the domicile could still tax. The answer to that question is not free from serious doubt, a doubt which the Supreme Court of the United States has sounded notwithstanding its holding that the state of the domicile might tax even though the "business situs" theory applied. *Cream of Wheat Co. v. County of Grand Forks*, 253 U. S. 325. It is interesting to observe the growing tendency of this doubt. It manifests itself both prior to and subsequent to the holding in the *Cream of Wheat* case. For example, in the case of *Union Refrigerator Transit Co. v. Kentucky*, 199 Id. 194, decided prior to the *Cream of Wheat* case, and in the case of *Frick v. Pennsylvania*, 268 Id. 473 (Overruled on other grounds), it was held that tangible property may be taxed only by one state; and again the court has held, since the *Cream of Wheat* case, that in the absence of the applicability of the "business situs" exception, only the state of the domicile might tax intangibles. *Farmers Loan and Trust Co. v. Minnesota*, *supra*; *Baldwin v. Missouri*, 281 Id. 586; *Beidler v. South Carolina Tax Commission*, 282 Id. 1; *First National Bank of Boston v. Maine*, *supra*. In so holding the court was very careful to point out, notwithstanding its

holding in the *Cream of Wheat* case, that the question involving the right of the domiciliary state to tax when the business situs exception applied is an open one. Decision thereof has been expressly reserved *Cf. Farmers Loan and Trust Co. v. Minnesota, supra* (At p. 213), and *First National Bank of Boston v. Maine, supra* (at p. 331). While this doubt has been cast by the highest court of our land, that body has never expressly overruled its decision in the *Cream of Wheat* case. Until such time as that case is reconsidered, we are bound by its holding that there is a sufficient interrelation between the state of the domicil and the intangibles which have acquired a business situs elsewhere to justify the imposition of a personal property tax by the former upon the latter.

Nor do we, by so deciding, run afoul of the strong modern sentiment against multiple taxation as manifested by the United States Supreme Court. See *Farmers Loan and Trust Co. v. Minnesota, supra* (at p. 212); *First National Bank of Boston v. Maine, supra* (at pp. 326, 334). For, as has been pointed out, prosecutor pays no personal property tax in New York. Thus under the circumstances here prohibited multiple taxation is impossible. Prosecutor may not invoke the dictum that "the rule of immunity from taxation by more than one state . . . is broader than its application thus far made of it." *First National Bank of Boston v. Maine, supra* (at p. 326).

Second. As to the item of unearned premium reserve.

We are aware of the fact that sound accounting practice requires that this item be booked as a liability. Nor are we unmindful of the many things that may be said in favor of such a requirement. Modern statistical analyses available to companies in the position of prosecutor may and do compute to a very accurate degree just what part of the reserve will be expended each year. But companies do not control the fund so set up. They invest them and earn a return upon them. Because of these factors our sister states have divided upon the answer to this problem. See *A. L. R. 189, et seq.* Our Court of Errors and Appeals has taken the position that this item, at least for the purpose of taxation, should be considered an asset. *City of*

Trenton v. Standard Fire Insurance Co., 77 N. J. L. 757; 73 Atl. Rep. 606. Whether the reserve set up consists of exempt securities, and the exemption of the reserve fund as claimed would thus result in a double deduction is not made clear. But be that as it may, this court is bound by the decision in the case of *City of Trenton v. Standard Fire Insurance Co. supra*.

Third. The parties stipulated before the board that prosecutor had cash on hand or on deposit as of October 1st, 1934, of \$532,794.54 of which amount the sum of \$6,425.32 was deposited in banks of New Jersey and the balance of \$526,359.22 represents cash on hand in either the New York office or on deposit in New York banks. The state board determined that this item was exempt under *Pamph. L. 1933, ch. 165, p. 346*. Respondent's argument that this determination is incorrect, if properly before us, is sound. Prosecutor's cash on hand or on deposit as of October 1st, 1934, was not exempt; it was taxable. *Newark v. State Board of Tax Appeals*, 118 N. J. L. 131; 191 Atl. Rep. 843. We are, of course, under section 11 of our *Certiorari* act (1 *Comp. Stat.* 1709-1910, pp. 402, 406), obliged to "determine disputed questions of fact as well as of law * * *." But that, under the circumstances exhibited and generally stated, means disputes, as to facts or law or both, properly raised. Is the point properly before us? We think not. True it was raised and disputed before the state board of tax appeals; the latter passed judgment upon it. But it is also true that, save as to the argument made here upon the point, respondents permitted the judgment of the board to stand unchallenged. It cannot now properly be heard to complain. The fact of the matter is that, notwithstanding its argument to the contrary, respondents conclude their brief with the submission "that the judgment of the state board of tax appeals should be affirmed and the writ of *certiorari* dismissed."

The judgment of the state board of tax appeals is, therefore, affirmed, with costs.

EXHIBIT "C".**COURT OF ERRORS AND APPEALS, STATE OF NEW JERSEY.****NEWARK FIRE INSURANCE COMPANY, *Appellant*,*****vs.*****STATE BOARD OF TAX APPEALS ET AL., *Respondents*.****Opinion.**

On appeal from the Supreme Court, whose opinion is reported in 113 N. J. L. 525.

For the appellant, Arthur T. Vanderbilt.

For the respondents, James F. X. O'Brien.

Per CURIAM:—

The judgment under review herein should be affirmed, for the reasons expressed in the opinion delivered by Mr. Justice Perskie in the Supreme Court.

For affirmance as to first and third parts—The Chancellor, Chief Justice, Trenchard, Parker, Donges, Porter, Hetfield, Dear, Wells, Wolfskeil, Rafferty, Walker, JJ. 12.

For reversal as to second part—Walker, J. 1.

A true copy.

THOMAS A. MATHIS,
Clerk.



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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1938

No. 456

UNIVERSAL INSURANCE COMPANY,

L.

vs.

Appellant,

**STATE BOARD OF TAX APPEALS OF THE STATE
OF NEW JERSEY AND THE CITY OF NEWARK,**

Respondents.

UNIVERSAL INDEMNITY INSURANCE COMPANY,

vs.

Appellant,

**STATE BOARD OF TAX APPEALS OF THE STATE
OF NEW JERSEY AND THE CITY OF NEWARK,**

Respondents.

**STATEMENT OF BASIS OF JURISDICTION OF THE
SUPREME COURT UNDER RULE 12, PARAGRAPH 1.**

The appellants contend that the basis upon which the Supreme Court of the United States has jurisdiction to review the judgment of the Court of Errors and Appeals, is:

First.

The statutory provision sustaining the jurisdiction is found in United States Code Annotated, Title 28, Section 344-a (formerly Judicial Code Section 237):

"A final judgment or decree in any suit in the highest court of a State in which a decision in the suit could be had, where is drawn in question the validity of a treaty or statute of the United States, and the decision is against its validity; or where is drawn, in question the validity of a statute of any State, on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, and the decision is in favor of its validity, may be reviewed by the Supreme Court upon a writ of error. The writ shall have the same effect as if the judgment or decree had been rendered or passed in a court of the United States. The Supreme Court may reverse, modify, or affirm the judgment or decree of such State court, and may, in its discretion, award execution or remand the cause to the court from which it was removed by the writ."

This statute is also found in 43 Statutes 937 Chapter 229 of the Laws of 1925.

Second.

Statute of the State the validity of which is involved. Chapter 236 of the Laws of 1918, Section 202:

"All property, real and personal, within the jurisdiction of this state, not expressly exempted by this act or excluded from its operation, shall be subject to taxation annually under this act at its true value, and shall be valued by the assessors of the respective taxing districts. Property omitted by the assessors may be assessed as hereinafter provided. All property shall be assessed to the owners thereof with reference to the amount owned on the first day of October in each year, and the persons so assessed for personal prop-

erty shall be personally liable for the taxes thereon.
(P. L. 1918, p. 848.)"

Section 301:

"The tax on all tangible personal property in this State and on all taxable personal property of non-residents of this State shall be assessed in and for the taxing district where such property is found. The tax on other personal property shall be assessed on each inhabitant in the taxing district where he resides on the first day of October in each year. Personal property in the possession or under the control of any person as trustee, guardian, executor or administrator shall be assessed in his name as such, separate from his individual assessment, or in the name of any of several joint trustees, guardians, executors or administrators, if the one of them having actual control or possession cannot be ascertained by the assessor; but the personal property belonging to the estate of any decedent shall be assessed in the taxing district wherein the decedent resided at the time of his death, except such part of the tangible property thereof as may be actually located in some other taxing district in this State and assessed therein. Personal property consisting of stocks in trade and materials used in manufacture in this State, which shall include raw materials, fuel, goods in process of manufacture and completed products, shall be estimated at the average of such personalty located in the taxing district during the year preceding the date as of which the assessment is made, or the average for such portion of the year that such property may be in the possession of the person assessed. (P. L. 1918, p. 853, as amended by P. L. 1920, p. 561.)"

Section 307:

"Every fire insurance company and every stock insurance company other than life insurance shall be assessed in the taxing district where its office is situate,

upon the full amount of its capital stock paid in and accumulated surplus; the real estate belonging to every such corporation, however, shall be taxed in the taxing district where such real estate is situated, and the amount of assessment upon said real estate shall be deducted from the amount of any assessment made upon the capital stock and accumulated surplus, as herein provided for; no franchise tax shall be imposed upon any such fire insurance company or other stock insurance company included in this section. (P. L. 1918, p. 858.)"

These sections were in effect at the time this tax was levied, but have since been revised and are now found in Revised Statutes of New Jersey, 1937, Sections 54:4-1, 54:4-9 and 54:4-22:

"54:4-1. Property subject to tax; date of assessment. All property, real and personal, within the jurisdiction of this state not expressly exempted from taxation or expressly excluded from the operation of this chapter shall be subject to taxation annually under this chapter at its true value, and shall be valued by the assessors of the respective taxing districts. Property omitted by the assessors may be assessed as herein-after provided. All property shall be assessed to the owner thereof with reference to the amount owned on October first in each year, and the person so assessed for personal property shall be personally liable for the taxes thereon."

"54:4-9. Personal property; where assessed. The tax on all tangible personal property in this state and on all taxable personal property of non-residents of this state, except as otherwise provided in this title, shall be assessed in and for the taxing district where the property is found. The tax on other personal property shall be assessed on each inhabitant in the taxing district where he resides on October first in each year."

54:4-22—Same as Section 307.

It is contended that the question before the Court of Errors and Appeals and all of the lower courts was the validity of the sections of the statutes quoted, on the ground that said statutes were repugnant to the 14th Amendment of the Constitution of the United States, and it is now contended that the decision of the Court of Errors and Appeals and its judgment is in favor of the validity of the said sections of the statute and, therefore, the decision may be reviewed by the Supreme Court by appeal.

The basis for this contention is: The City of Newark given the power, by the sections of the statutes quoted, levy assessments against the capital stock and accumulated surplus of insurance companies such as petitioners. The time and method of making these assessments are fixed by Sections 202 and 301 and Section 307 applies exclusively to fire and stock insurance companies. Petitioners' capital and surplus consists of intangible personal property, such as accounts receivable, cash and securities, all located at the home office in the City of New York on the taxing date, October 1, 1934, the date upon which the levy must be made under the statutes, to fix the 1935 tax. Petitioners have contended that if the assessments were held valid, that the statutes under which the assessments are made by the City are repugnant to the 14th Amendment, giving the City the right to levy and assess personal property beyond its jurisdiction, and which property has its business situs in the City and State of New York, beyond the taxing district of the City of Newark, thus depriving the petitioners their property without due process of law.

The Court of Errors and Appeals, by its decision and judgment, has construed and applied these sections of the statute as permitting and allowing an assessment by the City of Newark against petitioners' property, although pe-

tioners' business *situs* is in New York City, State of New York, beyond the jurisdiction of the taxing district. Thus there is drawn in question the validity of the statute on the ground that it is repugnant to the Constitution, and the decision is in favor of its validity and it may be reviewed by the Supreme Court under Section 344-a.

Third.

The date of the judgments sought to be reviewed is May 31, 1938, and the date upon which the application for the appeal was presented, was August 16, 1938.

Fourth.

Nature of case, raising of Federal question and rulings of Court.

The constitutional question was first raised before the Essex County Board of Taxation, but there was no ruling made by that Board. On the appeal to the State Board of Tax Appeals, the constitutional question of the validity of the assessment with respect to the property beyond the jurisdiction of the City, was presented and argued in the brief and was definitely passed on in the opinion, as will appear from the printed record (page 15), made a part of the transcript. The State Board, in its opinion, definitely found that the business *situs* of the companies was located in the City and State of New York, but overruled the contention that the assessment, if held valid, would render the State statutes mentioned repugnant to the 14th Amendment to the Constitution, citing the opinion of the Board in the case of the *City of Newark v. Newark Fire Insurance Company*. Copy of this opinion is attached to this statement.

Thus, there was a holding that the City of Newark has jurisdiction to tax intangibles beyond its jurisdiction,

where the business *situs* is elsewhere, and, therefore, the statutes mentioned, upon which the authority of the City to assess rests, are held to give to the City that power and right to assess intangible personal property under these sections, where the intangibles are beyond the jurisdiction and the business *situs* is in the City and State of New York. Therefore, such sections of the statute as applied are repugnant to the 14th Amendment of the Constitution of the United States.

The constitutional question was raised in the reasons set up on the appeal to the New Jersey Supreme Court (printed case page 139). The same constitutional question was argued in the brief and passed upon by the Supreme Court in its opinion (printed State of case page 141). The business *situs* question is determined on the basis of *Newark Fire Insurance Co. v. State Board of Tax Appeals*, 118 N. J. Law 525, and a copy of the opinion in that case is attached hereto.

It will be seen from the opinion that in both the present case and in the *Newark Fire* case the question of the business *situs* of the companies here is definitely held to be in New York, so there is no question or dispute on the facts determining that point. (See the first paragraph of the opinion of Mr. Justice Perskie on page 141 of the state of case.)

The gist of the argument is that double taxation is not illegal, under the decisions of the Supreme Court of the United States, cited in the opinion, and the decision in the *Universal* cases, by the opinion of the Supreme Court, is based upon the *Newark Fire* opinion. While the opinion in the *Newark Fire* case does not definitely mention that the sections of the Tax Act referred to are repugnant to the 14th Amendment, by upholding the assessment, the effect of the sustaining of the right of the City to tax intangibles

beyond its jurisdiction has the same effect, and the Supreme Court in the case of petitioners affirmed the jurisdiction of the City to tax on the same basis as set forth in the opinion in the *Newark Fire* case.

These same constitutional questions were set up in the Court of Errors and Appeals, argued in the brief, and that court affirmed on the opinion of the Supreme Court, 120 N. J. L. 185. (See copy of opinion attached.)

The decisions of the Supreme Court of the United States which sustain the jurisdiction of the Supreme Court of the United States to review upon appeal are: *Safe Deposit & Trust Co. v. Virginia*, 280 U. S. 83; *Wheeling Steel Corp. v. Fox*, 298 U. S. 193; *Myles Salt Co. v. Board of Commissioners*, 239 U. S. 478; *Fox River Paper Co. v. The Commission*, 274 U. S. 651; *Fiske v. State of Kansas*, 274 U. S. 380; *First Bank Stock Corp. v. Minnesota*, 301 U. S. 234.

It is sufficient to confer jurisdiction, if the highest court of a State holds that the statutes as administered and applied, as in the case at bar, are not contrary to the 14th Amendment. The decision of the Court of Errors and Appeals and of the Supreme Court upon which it is based, have so applied and administered the statutes under which the assessments by the City were made.

In *Lynch v. New York ex rel. Pierson*, 293 U. S. 52-55, it is said:

"It is essential to the jurisdiction of this Court in reviewing a decision of a court of a State that it must appear affirmatively from the record, not only that a federal question was presented for decision to the highest court of the State having jurisdiction but that its decision of the federal question was necessary to the determination of the cause, and that it was actually decided or that the judgment as rendered could not have been given without deciding it. * * * (Citing cases). Where the judgment of the state court rests on two grounds, one involving a federal question and the other

not, or if it does not appear upon which of two grounds the judgment was based, and the ground independent of a federal question is sufficient in itself to sustain it, this Court will not take jurisdiction." (Citing cases.)

In the case at bar, the Court of Errors and Appeals must have necessarily based its judgment on the Federal question, in holding that the assessments in question were valid. The Supreme Court held that as to the jurisdiction to tax, the case at bar must follow the *Newark Fire Insurance Company v. The State Board*, *supra*, and in the latter case the Supreme Court in its opinion squarely held that a personal property tax might be levied by the State of the domicile of the corporation upon intangible personal property, with its business *situs* beyond the jurisdiction. In so holding, the Supreme Court, in that case, followed the doctrine of the *Cream of Wheat* case, reported in 253 U. S. 325. That latter case held squarely that the 14th Amendment does not prevent double taxation and

"the limitation of the 14th Amendment upon the power of the State to tax the property of its residents which has acquired a permanent *situs* outside the State, does not apply to intangible property, even though it has acquired a business *situs* and is taxable in another State."

The judgment of the Court of Errors and Appeals in the case at bar, in so far as the jurisdiction to tax is concerned, rests upon the decision of the Supreme Court, and that decision in turn is disposed of and settled by the *Newark Fire Insurance* opinion. Therefore, the judgment of the Court of Errors and Appeals in the case at bar was necessarily based upon the Federal question, as to whether the assessment of the petitioners' intangible personal property, having its business *situs* outside the jurisdiction, under the statutes mentioned, was repugnant to the 14th Amendment

to the Constitution of the United States, and does not deprive the petitioners of their property without due process of law.

In *Wheeling Steel Company v. Fox*, *supra*, it is noticeable that the opinion of the lower court, found in 177 South-eastern Rep. 535, 104 A. L. R. 802, does not expressly mention the constitutional question, but holds that the intangible property, although outside of the jurisdiction, is taxable at the business *situs*. The United States Supreme Court assumed jurisdiction. A constitutional question was necessarily decided in that case, which is similar to the decision of the highest court in the case at bar.

There are several questions decided by the Supreme Court in addition to the Federal question, but all of those questions related to the method of arriving at the assessment on the capital stock and accumulated surplus under the statute, assuming *first* that the City had the power to tax. Consequently the decision of the Federal question was essential and if the City had no jurisdiction to tax, then, of course, the other questions were not necessary to the decision at all, so the judgment of the State Court here rests on the Federal question, and all the other questions are merely incidental and involve only the amount of the assessment.

Fifth.

The question here involved is substantial.

The opinion of the Supreme Court in *Newark Fire Insurance Co. v. State Board of Tax Appeals*, 118 N. J. Law 525, adopted by the Court of Errors and Appeals as its own opinion in affirming the judgment in that case, is sufficient ground to show that the question here presented is a very substantial one. Reference to a copy of the opinion in that case shows that the first question argued was as to the jurisdiction to tax prosecutor in this State. The court says that:

"This question must, in the light of the proofs be considered upon the inescapable premise that prosecutor had its business *situs* as of October 1, 1934 and still has, in New York."

In the case at bar the opinion says:

"The facts in the case at bar are practically identical, save as to the names of the parties, their respective addresses here and in New York, and the facts were those set forth in the case of *Newark Fire Insurance Company v. State Board of Tax Appeals*, 118 N. J. Law 525."

Both of these opinions were adopted by our Court of Errors and Appeals and are dispositive of the question of fact as to the business *situs* of the petitioner here, which must be held to be in New York State.

In the *Newark Fire Insurance* case, the opinion then proceeds to review the business *situs* doctrine as applied to personal property taxation, citing the well known doctrine that intangibles first were held to be taxable at the domicile of the owner and later the Supreme Court had made an exception in holding that the State where intangibles had acquired a business *situs* had jurisdiction to levy a personal property tax upon the intangibles. Then the question arose as to whether, when the business *situs* theory did apply, the State of the domicile could tax. The opinion then says:

"The answer to that question is not free from serious doubt, a doubt which the Supreme Court of the United States has found, notwithstanding its holding that the state of the domicile might tax, even though the business *situs* theory applied. *Cream of Wheat Co. v. County of Grand Forks*, 253 U. S. 325."

The opinion then goes on to trace the "growing tendency of the doubt", citing the case of *Frick v. Pennsylvania*, 268 U. S. 473, holding that tangible property may be taxed only

in one State where it is located, and that in the absence of a business *situs* outside of the domicile, only the State of the domicile might tax intangibles. Citing *Farmers Loan & Trust Co. v. Minnesota*, 280 U. S. 204. The Court then goes on to say:

"In so holding the court was very careful to point out, notwithstanding its holding in the *Cream of Wheat* case, that the question involving the right of the domiciliary state to tax when the business *situs* question applies, is an open one. Decision thereof has been specially reserved. *Farmers Loan & Trust Co. v. Minnesota*, (at page 213) and *First National Bank of Boston v. Maine* (at page 331)."

The opinion then goes on to say that since there has been no express overruling of the *Cream of Wheat* case, that this Court is bound to hold that the domiciliary State may impose a tax.

The facts in the petitioners' case raise directly the point which the New Jersey Supreme Court says has never been definitely decided. Here is the domiciliary State of the petitioners seeking to tax intangibles at their business *situs* elsewhere. The *Cream of Wheat* case has never been expressly overruled, but great doubts have been cast upon the right of the domiciliary State to tax where the intangibles are out of the jurisdiction. The facts here appearing in the record, squarely raise this question before this Court, and it must be considered substantial, in view of the number of recent cases bearing on the point, such as *Wheeling Steel Co. v. Fox*, *First Bank Stock Corp. v. Minnesota*, *supra*, and *Whitrey v. Graves*. Yet, the question appears to be open.

The New Jersey Supreme Court, in its opinion, refers to the fact that there is no personal property tax levied

against the prosecutors in New York, but we say that this does not alter the situation, because even though this be true, it would not give the domiciliary State the jurisdiction to tax on property outside of the jurisdiction.

Buck v. Beach, 206 U. S. 392, is authority for the point that the companies are not taxable in New Jersey merely because there is no personal property tax on insurance companies in New York. The Court said:

"An attempt to escape probable taxation in Ohio does not confer jurisdiction to tax property asserted to be in Indiana. The question still remains, was there any property within the jurisdiction of the State of Indiana."

Johnson Oil Co. v. Oklahoma, 290 U. S. 158; *Farmers Loan & Trust Co. v. Minnesota*, 280 U. S. 204, and *Southern Pacific v. Kentucky*, 222 U. S. 63.

In *Commonwealth v. West India Oil Co.*, 192 S. W. 301 (Kentucky), it was sought to tax the accounts due the defendant in the State of Kentucky, which was a Kentucky corporation, with its principal registered office located there and all of its property and entire business located in Cuba and Puerto Rico, where all the accounts were collected and money was kept. The only jurisdiction the court acquired was the fact that the domicile of the corporation was in Kentucky and it had its principal office there. It was held that the defendant was not taxable in Kentucky, under the Kentucky statute, on its personal property, and the court went on to say:

"The question is not, therefore, whether the property has been taxed in Cuba. The question is, is it taxable here? If not taxed there it still may be, but if not, it does not give this court jurisdiction to tax it here."

indicating that the fact that there was no personal property tax in New York levied against the prosecutors, had nothing to do with the legal right of the City of Newark to tax in New Jersey.

JERHIEL G. SHIPMAN,
JOHN G. JACKSON,
Attorneys for and of Counsel with.
Petitioners-Appellants.

EXHIBIT "A".

NEW JERSEY SUPREME COURT.

MAY TERM, 1937.

No. 208.

NEWARK FIRE INSURANCE COMPANY, *Prosecutor,*

v.

STATE BOARD OF TAX APPEALS and CITY OF NEWARK, a Municipal Corporation of the State of New Jersey, *Respondents.*

Submitted May —, 1937. Decided August 31, 1937.

On Certiorari.

Before Justices Bodine, Heher and Perskie.

For prosecutor: Arthur T. Vanderbilt.

For respondents: Frank A. Boettner, John A. Matthews.

The opinion of the court was delivered by PERSKIE, J.:

The question before us concerns the validity of the personal property assessment made by the City of Newark on October 1, 1934, for the year 1935 against prosecutor. The assessment was made in accordance with our general tax act. P. L. 1918, chap. 307, p. 858, as amended.

Prosecutor is a general fire insurance company organized under the laws of this state with its registered office at 31 Clinton Street, in the City of Newark. For six years prior to the assessment its main and executive offices have been and now are at 150 William Street, in the City of New York. Prosecutor's general business is conducted in New York, and all the books of the company, except those required by law to be kept at its registered office in New Jersey, are located there. Although a small amount of cash and some few securities are kept in New Jersey so that business may be done here, the great majority of these items

is either in the New York Offices or in banks in that State. The business conducted at the Newark office is confined to local regional underwriting and the adjustment of claims arising therefrom. Reports on such business are sent to the main office in New York. The record also discloses that prosecutor pays no personal property tax in New York, and, for aught that appears, no such tax is exacted by that State.

The State Board of Tax Appeals affirmed the assessment as made by the taxing authorities of Newark thereby assessing the intangible property owned by prosecutor. This court granted certiorari and prosecutor argues that the assessment as made should be reduced because (1) New Jersey has no jurisdiction to tax the intangibles; and (2) because it was error to include the item of unearned premium reserve as a taxable asset.

First. *As to jurisdiction to tax prosecutor in this State.* This question must, in light of the proofs, be considered upon the inescapable premise that prosecutor had its business *situs* as of October 1, 1934, and still has it, in New York; that the securities, the personalty involved, have become an integral part of its business *situs* in New York; but that prosecutor pays no personal property tax to the State of New York.

It is fundamental that jurisdiction to tax depends primarily on the type of tax sought to be exacted and the property that is subject to the tax. Here the tax, under the act, is a personal property tax. The property subject to the tax constitutes securities which represent paid in capital stock and accumulated surplus of the company. Such securities are clearly intangibles. It is well settled that intangible personalty is taxable at the domicile of the owner. *Kirtland v. Hotchkiss*, 100 U. S. 491; *Blodgett v. Silberman*, 277 U. S. 1; *Farmers Loan & Trust Co. v. Minnesota*, 280 U. S. 204. That principle finds its support in the legal maxim *mobilia sequuntur personam*. The use of this maxim like the use of most other maxims in jurisprudence, is not the solution of the problem; it is merely a formal and unexplanatory statement of a legal conclusion. Cf. 9 Harvard Law Review 13; 8 Am. L. Rev. 519. Thus frequently its use is not very helpful. But since contrary to the case of

tangibles, intangibles have no actual situs, are not physically under the definite control of any one jurisdiction, the rule, as embraced in the maxim developed is justified even to this day as a rule of convenience. Convenience however brings hardship. So it was not long before exceptions to the general rule as stated gradually found and worked themselves into the law. Thus it has been held that where intangible personal property became an integral part of a business carried on in a state other than that of the domicile of the owner of the intangibles, then that other state, the state wherein the intangibles acquired a "business situs" had jurisdiction to levy a personal property tax upon these intangibles. *New Orleans v. Stempel*, 175 U. S. 309; *Metropolitan Life Ins. Co. of N. Y. v. New Orleans*, 205 U. S. 395; *Wheeling Steel Corp. v. Fox*, 298 U. S. 193; *Safe Deposit & Trust Co. v. Virginia*, 280 U. S. 583; *Farmers Loan & Trust Co. v. Minnesota*, 280 U. S. 204; *First National Bank of Boston v. Maine*, 284 U. S. 312, see 76 A. L. R. 806. Conceding the application of this exception to the general rule, the problem soon arose as to whether, when the "business situs" theory did apply, the state of the domicile could still tax. The answer to that question is not free from serious doubt, a doubt which the Supreme Court of the United States has sounded notwithstanding its holding that the state of the domicile might tax even though the "business situs" theory applied. *Cream of Wheat Co. v. County of Grand Forks*, 253 U. S. 325. It is interesting to observe the growing tendency of this doubt. It manifests itself both prior to and subsequent to the holding in the *Cream of Wheat* case. For example, in the case of *Union Refrigerator Transit Co. v. Kentucky*, 199 U. S. 194, decided prior to the *Cream of Wheat* case, and in the case of *Frick v. Pennsylvania*, 268 U. S. 473, (overruled on other grounds) it was held that tangible property may be taxed only by one state; and again the court has held, since the *Cream of Wheat* case, that in the absence of the applicability of the "business situs" exception, only the state of the domicile might tax intangibles. *Farmers Loan & Trust Co. v. Minnesota*, *supra*; *Baldwin v. Missouri*, 281 U. S. 586; *Beidler v. South Carolina Tax Commission*, 282 U. S. 1; *First National Bank of Boston v. Maine*, *supra*. In so holding the court

was very careful to point out, notwithstanding its holding in the Cream of Wheat case, that the question involving the right of the domiciliary state to tax when the "business situs" exception applied is an open one. Decision thereof has been expressly reserved. Cf. *Farmers Loan & Trust Co. v. Minnesota*, *supra*, at p. 213, and *First National Bank of Boston v. Maine*, *supra*, at p. 331. While this doubt has been cast by the highest court of our land, that body has never expressly overruled its decision in the Cream of Wheat case. Until such time as that case is reconsidered, we are bound by its holding that there is a sufficient interrelation between the state of the domicile and the intangibles which have acquired a business situs elsewhere to justify the imposition of a personal property tax by the former upon the latter.

Nor do we, by so deciding run afoul of the strong modern sentiment against multiple taxation as manifested by the United States Supreme Court. See *Farmers Loan & Trust Co. v. Minnesota*, *supra*, at p. 212; *First National Bank of Boston v. Maine*, *supra*, at p. 326, 334. For, as has been pointed out, prosecutor pays no personal property tax in New York. Thus under the circumstances here exhibited multiple taxation is impossible. Prosecutor may not invoke the dictum that "the rule of immunity from taxation by more than one state * * * is broader than the application thus far made of it." *First National Bank of Boston v. Maine*, *supra*, at p. 326.

Second. *As to the item of unearned premium reserve.* We are aware of the fact that sound accounting practice may require this item to be booked as a liability. Nor are we unmindful of the many things that may be said in favor of such a requirement. Modern statistical analyses available to companies in the position of prosecutor may and do compute to a very accurate degree just what part of such reserve will be expended each year. But companies control the fund so set up. They invest them and earn a return upon them. Because of these factors our sister states have divided upon the answer to this problem. See 13 A. I. R. 189. *et seq.* Our Court of Errors and Appeals has taken the position that this item, at least for the pur-

pose of taxation, should be considered an asset. *City of Trenton v. Standard Fire Ins. Co.*, 77 N. J. L. 575, 73 At. 606. Whether the reserve set up consists of exempt securities, and the exemption of the reserve fund as claimed would thus result in a double deduction is not made clear. But be that as it may, this court is bound by the decision in the case of *City of Trenton v. Standard Fire Ins. Co. supra*.

Third. The parties stipulated before the Board that prosecutor had cash on hand or on deposit as of October 1, 1934 of \$532,784.54 of which amount the sum of \$6,425.32 was deposited in banks of New Jersey and the balance of \$526,359.22 represents cash on hand in either the New York office or on deposit in New York banks. The State Board determined that this item was exempt under P. L. 1933, chap. 165, p. 346. Respondents argument that this determination is incorrect, if properly before us, is sound. Prosecutors cash on hand or on deposit of October 1, 1934 was not exempt; it was taxable. *Newark v. State Board of Tax Appeals*, 118 N. J. L. 131, 191 At. 843. We are, of course, under section 11 of our Certiorari act (1 C. S. (1709-1910) p. 402-406), obliged to "determine disputed questions of fact as well as of law * * *" but that, under the circumstances exhibited and generally stated, means disputes, as to facts or law or both, properly raised. Is the point properly before us? We think not. True, it was raised and disputed before the State Board of Tax Appeals; the latter passed judgment upon it. But it is also true that, save as to the argument made here upon the point, respondents permitted the judgment of the Board to stand unchallenged. It cannot now properly be heard to complain. The fact of the matter is that, notwithstanding its argument to the contrary, respondents conclude their brief with the submission "that the judgment of the State Board of Tax Appeals should be affirmed and the writ of certiorari dismissed."

The judgment of the State Board of Tax Appeals is, therefore, affirmed with costs.

A true copy.

FRED L. BLOODGOOD,
Clerk.

EXHIBIT "B".**STATE BOARD OF TAX APPEALS, STATE OF NEW JERSEY.****UNIVERSAL INSURANCE COMPANY, *Appellant*,****v.****CITY OF NEWARK, *Respondent*.****UNIVERSAL INDEMNITY INSURANCE COMPANY, *Appellant*,****v.****CITY OF NEWARK, *Respondent*.****Opinion.**

In the matter of the application for cancellation, and in the alternative, for reduction of personal property tax upon capital stock and accumulated surplus of Universal Insurance Company and Universal Indemnity Insurance Company, New Jersey corporations claiming to have business situs in New York.

Appearances:

For appellants, Child, Riles, Marsh & Shipman, Esqs., by Jehiel G. Shipman, Esq.

For respondent, Frank A. Boettner, Esq., by John A. Matthews, Esq.

WEAVER, *President*:

These two appeals, presenting common questions of law and fact, were tried together. Both corporations are managed by the same officers, operate from the same offices, and are represented by the same counsel. They are New Jersey corporations, maintaining registered offices at Newark, New Jersey, and business offices in New York City, managed and conducted by a New York corporation, Talbot, Bird & Company, Incorporated. With minor exceptions, all of their assets are kept in the State of New York.

The Board of Assessors of the City of Newark levied personal property assessments based upon their paid in capital and accumulated surplus. On appeal to the Essex County Board of Taxation, judgments reducing the assessments were entered by consent of the parties. Appellants seek to have these assessments cancelled, or, in the alternative, reduced upon the following grounds:

(1) The Company is not taxable in New Jersey because its business *situs* is in New York.

(2) (a) That reserves for unearned premiums, and (b) reserves for agency balances over ninety days old, should not be included in the capital and accumulated surplus, thereby reducing the capital and accumulated surplus by the amounts represented by said terms, and that after the deduction of property claimed to be exempt, no taxable capital or accumulated surplus remains.

(3) That cash on hand or on deposit is exempt, and should be deducted from the taxable capital and accumulated surplus.

Appellants are taxable under Section 307 of the General Tax Act, P. L. 1918, p. 858.

The questions herein presented were reviewed at length by this Board in an opinion filed July 7, 1936, in the case of Newark Fire Insurance Company v. City of Newark, wherein it was held that the establishment of a permanent business *situs* in another State does not preclude the taxation of intangible personal property of a domestic corporation of this State; that reserves for unearned premiums and agency balances cannot be deducted from accumulated surplus; and that cash on hand or on deposit is exempt from taxation.

Stipulations of fact and financial statements of the companies were offered in evidence, from which it appears that in the Universal Insurance Company judgment entered by the County Board the following items were deducted from the assets in determining the accumulated surplus:

Reserve for outstanding losses	\$247,681.22
Book value of bonds and stocks over market value	916,125.92

Neither of these items is deductible from the assets in determining the accumulated surplus. See opinions of the Board in *City of Newark v. Commercial Casualty Insurance Company* and *New Jersey Insurance Company v. City of Newark*, filed July 14, 1936. The stipulations before this Board are to the effect that these items are deductible. While parties may stipulate facts, they cannot stipulate matters of law. The question whether these items are deductible from the assets in determining the amount of accumulated surplus is a question of law.

The taxable capital paid in and accumulated surplus of the Universal Insurance Company is in excess of the assessment as made by the Board of Assessors of the City of Newark, and under ordinary circumstances we would be required to restore the assessment as made by the Board of Assessors. However, we are without jurisdiction to change the judgment of the Essex County Board of Taxation, because it was entered by consent of the parties.

In *Borough of Kenilworth v. Board of Equalization of Taxes*, 78 N. J. L. 302; 72 A. 966, our Supreme Court said:

"The difficulty, however, with the appeal is that there was no controversy before the county board to review, for the record here shows that the assessor's assessment was presented to the county board, and there, after full consideration, ratified and confirmed with the consent of the borough officials. Having then consented to the confirmation of its own assessment by the county board, it is not perceived how the petitioner can be said to be 'aggrieved,' or that 'any controversy' can be said to exist which can be the subject-matter for determination by the state board."

The same situation exists with respect to the appeal of the Universal Indemnity Insurance Company, except as to the amounts involved.

For the reasons stated, the appeals are dismissed.

EXHIBIT "C".**NEW JERSEY SUPREME COURT.****MAY TERM, 1937.****UNIVERSAL INSURANCE COMPANY, *Prosecutor,******v.*****STATE BOARD OF TAX APPEALS OF THE STATE OF NEW JERSEY
and CITY OF NEWARK, *Respondents.*****UNIVERSAL INDEMNITY INSURANCE COMPANY, *Prosecutor,******v.*****STATE BOARD OF TAX APPEALS OF THE STATE OF NEW JERSEY
and CITY OF NEWARK, *Respondents.*****Argued May 6, 1937. Decided August 31, 1937.****On Certiorari.****Before Justices Bodine, Heher and Perskie.****For the prosecutors, Child, Biker, Marsh & Shipman.****For the respondents, John A. Matthews (Andrew B. Crummy, on the brief).****The opinion of the court was delivered by PERSKIE, J.:**

This is a taxation case. The facts in the case at bar are practically identical, save as to the names of the parties, their respective addresses here and in New York, and the figures, with those set forth in the case of Newark Fire Insurance Co. v. State Board of Tax Appeals (Supreme Court), 118 N. J. L. 525. The issues presented and decided in that case were (1) jurisdiction to tax; (2) taxation upon the item of unearned premium reserve; and (3) taxation upon cash. The issues presented for decision in the case at bar are (1) jurisdiction to tax; (2) taxation upon unearned premium reserve; (3) taxation upon reserve for

outstanding losses; and (4) taxation upon the item of book value of stocks and bonds over market value.

Deciding as we do that there is no difference in principle, for the purpose of taxation, between the item of reserve for losses and the item of unearned premium reserve, which we held to be taxable, our decision in the case of *Newark Fire Insurance Co. v. State Board of Tax Appeals*, *supra*, is dispositive of all issues in the case at bar save the fourth, wherein prosecutors contend that it was error to include the item of book value of its stocks and bonds over the market value thereof as a taxable asset.

In support of its contention it is argued that the regulations of insurance companies require book value of securities to be set up. These same regulations, it is pointed out, require the amortized value of the bonds and the market value of the stock to be set up under the heading of "Non-admitted assets." The board included these last two items as an asset, whereas prosecutors contend that the true value is to be determined by deducting the market value of stocks, and the amortized value of bonds from the book value and that this is done by first setting up the book value and then deducting the difference between the book value and the market or amortized value so that the net value is reflected in admitted assets with market value.

We perceive in this contention nothing more than another of the many varied attacks already made by the taxpayer upon the tax exacting authority in the time immemorial and continuing struggle between these two opposing forces. It presents nothing new. There is ample strength, ample precedent in the law to withstand and completely repel this assault. The basic weakness of this attack is that prosecutors proceed on the theory that exchange value or market value is the invariable test of true value under all circumstances. This is not so. In the words of our Court of Errors and Appeals in *Newark v. Tunis*, 82 N. J. L. 461; 81 Atl. Rep. 722 (opinion by Parker, J.), "• • • true value is not always to be ascertained by reference to selling price; • • • special circumstances may increase or depress market value without affecting true values or vice versa." And, on the other hand, as pointed out in that

opinion by reference to the opinion of the Supreme Court (81 N. J. L. 45; 81 Atl. Rep. 490—opinion by Swayze, J.) there are many factors, not by way of limitation but rather by way of example, such as "good will, dividend earning power, ability in management, public confidence," &c., which are not reflected in book value. Under the tax law it is the duty of the assessor to make an independent investigation of these and all other factors in determining the true value. The case of *Newark v. Tunis*, *supra*, stands, therefore, for the principle that, under ordinary and normal conditions, exchange or market value is a workable but not an invariable test of true value. "It (market value) is nothing more than a convenient index and evidence of true value under ordinary and normal conditions." *Id.* (at p. 463).

Thus the same court recently (1935) gave forceful illustration to the variability of the working rule. In determining true value, at a time of a depression when market prices were of no service, it held that, while county boards were not bound by bank figures (*Newton Trust Co. v. Atwood*, 77 N. J. L. 141; 71 Atl. Rep. 110; they must base their determination upon all the evidence) they were not obliged to rewrite them, and that since the bank made its own statement as to the value of its assets it could not, under the circumstances of that case, be heard to complain when those figures were accepted by local and state boards. *Second National Bank v. State Board of Tax Appeals*, 114 N. J. L. 573; 178 Atl. Rep. 96, and cases therein cited. The stated principles applicable to bank stock are also applicable to other stocks and bonds.

Prosecutors seek to distinguish the instant case from the *Second National Bank* case by pointing out, as already noted, that in the case at bar they were, pursuant to state requirements or regulations, obliged to set up market value of stock under the heading of "non-admitted assets," whereas in the *Second National Bank* case the book value was voluntarily set up. This is without merit. If prosecutors concluded the regulation complained of abortive, they should have sought recourse to the law; their statement had, moreover, no binding effect. *Newton Trust Co. v. Atwood*, *supra*. It was merely one of the factors which the

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county board was duty bound to consider with all other factors in the cause. From all that has been written it is quite obvious that there is no hard and fixed rule and force that is to be given by those charged with the duty of determining true value to each and every factor pertinent and ascertainable in a given case. That necessarily must depend upon the facts and circumstances of each particular case. Having ascertained the applicable factors determinative of true value, we next consider how these factors are to be admeasured in money. Our answer is as follows; what would the property sell for, as of the day it was assessed, at a fair and bona fide sale by private contract; or what in the opinion of the assessor, based on his investigation and all the proofs, could be obtained for the property in money at a fair sale, as of the day it was assessed, between a willing seller and a willing buyer, that is one not obliged to sell dealing with one not obliged to buy? *New Jersey Bell Telephone Co. v. City of Newark*, 118 N. J. L. 490.

"Taxation is an intensely practical matter * * *"
Farmers Loan and Trust Co. v. Minnesota, 280 U. S. 204; 74 L. Ed. 371, 375. It is an intense reality. We are of the opinion that the rule stated in the *Bell Telephone* case is comprehensive, it is intensely practical and real, it embodies all of the factors necessarily determinative of true value.

We are not at all convinced that the taxing authorities did not, in the case at bar, give due and proper regard to all the facts and circumstances necessarily applicable in determining the true value of prosecutor's taxable property.

We desire to mark the fact that we have not overlooked the point made by respondents that the state board of tax appeals was without jurisdiction because the judgment of the *Essex County Board of Taxation* was entered by consent of the parties. *Kenilworth v. State Board of Equalization of Taxes*, 78 N. J. L. 302; 72 Atl. Rep. 966. We pause long enough to make the observation that the holding of the state board of tax appeals sustaining the point was reached only after it had given full consideration to all of prosecutor's points and had found them to be without merit. Because of either state and public concern, or section 11 of the

Certiorari act (1 Comp. Stat. 1709-1910, pp. 402, 406) or both, we have reached our result on the merits.

Judgment is affirmed, with costs.

EXHIBIT "D".

STATE BOARD OF TAX APPEALS, STATE OF NEW JERSEY.

NEWARK FIRE INSURANCE COMPANY, *Appellant*,

v.

CITY OF NEWARK, *Respondent*.

Opinion.

Filed July 7, 1936.

In the matter of the application for cancellation, and in the alternative, for reduction of a personal property tax upon capital stock and accumulated surplus of Newark Fire Insurance Company, a New Jersey corporation claiming to have a business *situs* in New York.

Appearances:

For Appellant, Arthur T. Vanderbilt, Esq.

For Respondent, Frank A. Boettner, Esq., by John A. Matthews, Esq.

WEAVER, President:

The appellant, Newark Fire Insurance Company, is a corporation organized under the laws of the State of New Jersey, having its registered office at Newark, New Jersey. Its main business and executive office is located in New York City. All books of the company, except those required by law to be kept in this State, are retained in its New York office, where its general accounts are kept. With the exception of a small deposit in New Jersey, all of its cash and securities are in banks located in New York City. For the

past six years, the general affairs of the company have been conducted from the New York office, the only business carried on from its registered office in Newark being a local or regional claim and underwriting department.

The Board of Assessors of the City of Newark levied upon the company's capital and accumulated surplus a personal property assessment in the sum of \$1,069,000, which assessment was affirmed by the Essex County Board of Taxation on appeal. Appellant seeks to have this assessment cancelled (or in the alternative reduced), upon the following grounds:

1. The business *situs* of the company is in the City of New York.

2. (a) That reserves for unearned premiums, (b) reserves for taxes, and (c) agency balances over 90 days old, should not be included in its capital and accumulated surplus, thereby reducing the capital and accumulated surplus by the amounts represented by said items, and that after the deduction of property claimed to be exempt no taxable capital or accumulated surplus remains.

3. That cash on hand or on deposit is exempt and should be deducted from its taxable capital and accumulated surplus.

The company is taxable under Section 307 of the General Tax Act, P. L. 1918, p. 858, which provides:

"Every fire insurance company and every stock insurance company other than life insurance shall be assessed in the taxing district where its office is situate, upon the full amount of its capital stock paid in and accumulated surplus; the real estate belonging to every such corporation, however, shall be taxed in the taxing district where such real estate is situated, and the amount of assessment upon said real estate shall be deducted from the amount of any assessment made upon the capital stock and accumulated surplus, as herein provided for; no franchise tax shall be imposed upon any such fire insurance company or other stock insurance company included in this section."

Appellant's claim that it is not taxable in this State because its personal property and business *situs* are located in New York is without merit.

The company is incorporated under the Insurance Companies Act of this State (2 C. S. p. 2839), Section 3 of which provides that its certificate of incorporation shall contain,—

“The place where the principal office of said company is to be located and its general business conducted, which shall be within this State; * * *

This provision has been carried into the amendment of 1929,—Chapter 6, page 18. The appellant accordingly is required to maintain its principal office and carry on its general business within the State of New Jersey.

Section 305 of the General Tax Act, P. L. 1918, p. 856, provides that:

“Corporations of this State shall be regarded as residents and inhabitants of the taxing district where their chief office is located, and their personal property shall be taxed the same as that of an individual, except as in this act otherwise provided; * * *

In *Union Refrigerator Transit Company v. Kentucky*, 199 U. S. 194, the United States Supreme Court said:

“* * * there is an obvious distinction between the tangible and intangible property, in the fact that the latter is held secretly; that there is no method by which its existence or ownership can be ascertained in the State of its *situs*, except perhaps in the case of mortgages or shares of stock. So if the owner be discovered, there is no way by which he can be reached by process in a State other than that of his domicile or the collection of the tax otherwise enforced. In this class of cases the tendency of modern authorities is to apply the maxim *mobilia sequuntur personam*, and to hold that the property may be taxed at the domicile of the owner as the real *situs* of the debt, and also, more particularly in the case of mortgages, in the State

where the property is retained. Such has been the repeated rulings of this court. *Tappan v. Merchants' National Bank*, 19 Wall. 490; *Kirtland v. Hotchkiss*, 100 U. S. 491; *Bonaparte v. Tax Court*, 104 U. S. 592; *Sturges v. Carter*, 114 U. S. 511; *Kidd v. Alabama*, 188 U. S. 730; *Blackstone v. Miller*, 188 U. S. 189.

"If it occasionally results in double taxation, it much oftener happens that this class of property escapes altogether. In the case of intangible property, the law does not look for absolute equality, but to the much more practical consideration of collecting the tax upon such property, either in the State of the domicile or the *situs*."

In the case of *Cream of Wheat Company v. County of Grand Forks*, 253 U. S. p. 325, the United States Supreme Court held that the limitation of the Fourteenth Amendment upon the power of a State to tax the property of its residents which has acquired a permanent *situs* outside of the State does not apply to intangible property, even though it has acquired a business *situs* and is taxable in another State. In that case the Court said:

"The company was confessedly domiciled in North Dakota; for it was incorporated under the laws of that State. As said by Mr. Chief Justice Taney, 'It must dwell in the place of its creation, and cannot migrate to another sovereignty.' *Bank of Augusta v. Earle*, 13 Pet. 519, 588. The fact that its property and business were entirely in another State did not make it any the less subject to taxation in the State of its domicile. The limitation imposed by the Fourteenth Amendment is merely that a State may not tax a resident for property which has acquired a permanent *situs* beyond its boundaries. . . . The limitation upon the power of taxation does not apply even to tangible personal property without the State of the corporation's domicile, if, like a sea-going vessel, the property has no permanent *situs* anywhere. *Southern Pacific Co. v. Kentucky*, 222 U. S. 63, 68. Nor has it any application to intangible property, *Union Refrigerator Transit Co. v.*

Kentucky, *supra*, p. 205; *Hawley v. Malden*, 232 U. S. 1, 11, even though the property is also taxable in another State by virtue of having a 'business situs' there. *Fidelity & Columbia Trust Co. v. Louisville*, 245 U. S. 54, 59."

In *Maguire v. Trefry*, Tax Commissioner of Commonwealth of Massachusetts, 253 U. S. 12, 16, the United States Supreme Court said:

"In *Fidelity & Columbia Trust Company v. Louisville*, 245 U. S. 54, we held that a bank deposit of a resident of Kentucky in the bank of another State, where it was taxed, might be taxed as a credit belonging to the resident of Kentucky. In that case *Union Refrigerator Transit Co. v. Kentucky*, *supra*, was distinguished, and the principle was affirmed that, the State of the owner's domicile might tax the credits of a resident although evidenced by debts due from residents of another State. This is the general rule recognized in the maxim '*mobilia sequuntur personam*,' and justifying, except under exceptional circumstances, the taxation of credits and beneficial interests in property at the domicile of the owner."

In the case of *Citizens National Bank of Cincinnati v. Burr*, 257 U. S. 99, the United States Supreme Court held that a membership in the New York Stock Exchange held by a resident of Ohio was a property right, intangible in nature, and that whether it was subject to taxation by Ohio taxing laws was a question of State law, determinable by the State Court. In that case the Court said:

"Exemption from double taxation by one and the same State is not guaranteed by the Fourteenth Amendment (*St. Louis Southwestern Ry. Co. v. Arkansas*, 235 U. S. 359, 367-368); much less is taxation by two States upon identical or closely related property interests falling within the jurisdiction of both, forbidden. *Kidd v. Alabama*, 188 U. S. 730, 732; *Hawley v. Malden*, 232 U. S. 1, 13; *Fidelity & Columbia Trust Co. v. Louisville*, 245 U. S. 54, 58."

It is apparent that intangible personal property which has acquired a business *situs* in a State other than that of the owner, may be taxed both in the State where it has acquired a business *situs* and in the State of residence of the owner. The proofs establish that the company pays no personal property tax in the State of New York, and is now seeking to escape taxation in the State of New Jersey.

The Board concludes that appellant is subject to taxation upon its capital and accumulated surplus in the State of New Jersey.

The company's reserve for unearned premiums cannot be deducted as a liability from its capital and accumulated surplus. In *Inhabitants of the City of Trenton v. Standard Fire Insurance Co. of New Jersey*, 77 N. J. L. 757; 73 A. 606, the Court of Errors and Appeals held that the reserve for unearned premiums is not exempt from taxation and cannot be deducted from the gross assets to ascertain the capital and accumulated surplus. The Court said:

"This description is more applicable to an asset of the company set apart on its books to an amount equal to the cancellation value of its policies than it is to define a liability or debt. The fund is in the possession and control of the company, is invested by it in interest-bearing securities, and the profits yielded are substantial, and inure to the corporation. It seems not to be held on any trust, nor is it chargeable with any liability, other than that with which the capital and surplus are charged. It is a part of the surplus reserved from dividends. It may never be called upon to provide for the reinsurance of the company's risks or pay losses.

"The question arises, then, should the reserve fund be counted as a liability? In the case of *People's Fire Ins. Co. v. Parker, Receiver*, 34 N. J. Law, 479, affirmed 35 N. J. Law, 376, it was held by this court that the term 'accumulated surplus', in its application to stock companies, is well understood to refer to the fund they have in excess of their capital and liabilities, and that the word 'liabilities' there used means fixed liabilities, not contingent, citing *State v. Utter*, 34

N. J. Law, 493. An assessment, levied against the unearned premiums as a part of the accumulated surplus of the company, was in that case affirmed. The liabilities and losses upon policies issued and unexpired is not a fixed and definite liability, but merely contingent, and as such it should not be deducted from the gross assets in order to ascertain the capital stock and accumulated surplus."

The appellant claims that the sum of \$71,765.65, set aside as a reserve for Federal taxes, is deductible from the assets in determining the amount of capital stock and accumulated surplus. The City claims that this is not a debt and should not be deducted. In ascertaining the amount of the capital stock and accumulated surplus, it is necessary to deduct from the assets, not only debts but also liabilities. While a tax is not a debt, it is a fixed liability and should therefore be deducted.

Appellant's claim for deduction of \$119,109.72, representing agency balances over ninety days old, cannot be allowed, as this item represents neither debts nor liabilities. It is carried on the books of the company as an asset.

Appellant claims that the portion of its capital and accumulated surplus, representing cash on hand or on deposit, in the sum of \$532,784.54, is exempt from assessment, by virtue of Chapter 165, Laws of 1933.

If cash on hand or on deposit owned by an individual taxpayer is exempt from taxation, appellant is entitled to deduct it from its capital stock paid in and accumulated surplus, as corporations which are taxable upon the amount of capital stock paid in and accumulated surplus are entitled to deduct therefrom the securities (or property) which are exempt in the hands of individuals. *Newark City Bank v. Assessor of the 4th Ward of the City of Newark*, 30 N. J. L. 13. It therefore becomes necessary to determine whether the statute exempts the cash and deposits in bank of an individual taxpayer.

Chapter 165 of the Laws of 1933, which is an amendment to Section 203 of the General Tax Act of 1918, provides for the exemption of—

“Cash on hand or on deposit and loans or collateral of savings banks, mutual savings banks and institutions for savings organized under the laws of this State.”

The statute is ambiguous and is susceptible to two constructions,—one that cash on hand or on deposit owned by anyone is exempt, and that loans on collateral of savings banks, mutual savings banks and institutions for savings are exempt. The other construction is that cash on hand or on deposit in the various institutions mentioned in the Act, or cash of the institutions on deposit and loans on their collateral are exempt, in which case the exemption is limited to the institutions mentioned in the Act. If the latter construction be accepted,—that only cash on hand of the various institutions mentioned in the Act, and their deposits, are exempt, then the Act would be unconstitutional. *Tippett v. McGrath*, Col., 70 N. J. L. 110; 56 A. 134; affirmed 71 N. J. L. 338; 59 A. 1118, *Essex County Park Commission v. Town of West Orange*, 77 N. J. L. 575; 73 A. 511.

Where an act is susceptible to two constructions,—one making the Act constitutional and the other making it unconstitutional,—the courts have held that the construction which makes the Act constitutional must be accepted, for the reason that it must be inferred that the Legislature intended to pass a constitutional act. *State (Fidelity Trust Co.) v. Vogt*, 66 N. J. L. 86; 48 A. 580; *Commercial Trust Co. of N. J. v. Hudson County Board of Taxation*, 86 N. J. L. 424; 92 A. 263. Following this construction, it is necessary to hold that cash on hand or on deposit is exempt, without regard to ownership.

After allowing the items for which the company is entitled to either deduction or exemption, a taxable capital and accumulated surplus remains, in excess of the assessment as made.

For the reasons stated, the appeal is dismissed.

EXHIBIT "E".**NEW JERSEY COURT OF ERRORS AND APPEALS.****UNIVERSAL INSURANCE COMPANY, *Appellant*,*****vs.*****STATE BOARD OF TAX APPEALS OF THE STATE OF NEW JERSEY
and the CITY OF NEWARK, Respondents.****UNIVERSAL INDEMNITY INSURANCE COMPANY, *Appellant*,*****vs.*****STATE BOARD OF TAX APPEALS OF THE STATE OF NEW JERSEY
and the CITY OF NEWARK, Respondents.****Argued February 4, 1938. Decided April 28, 1938.****On Appeal from the Supreme Court, Whose Opinion is
Reported in 118, N. J. L. 538.****For the Appellants, Child, Riker, Marsh & Shipman.****For the Respondents, John A. Matthews.****Per CURIAM:**

The judgment under review herein should be affirmed, for the reasons expressed in the opinion delivered by Mr. Justice Perskie in the Supreme Court.

For affirmance—The Chancellor, Chief Justice, Parker, Case, Donges, Hetfield, Dear, Wells, Wolfskeil, Rafferty, Walker, JJ. 11.

For reversal—None.

For reversal as to second and fourth points—Case, Hetfield, Walker, JJ. 3.



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CHARLES ELMORE LECHELEY
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Supreme Court of the United States

OCTOBER TERM, 1938.

— • • —
No. 449.
— • • —

NEWARK FIRE INSURANCE COMPANY,
Appellant,

vs.

STATE BOARD OF TAX APPEALS and THE CITY
OF NEWARK,
Respondents.

BRIEF OF APPELLANT.

ARTHUR T. VANDERBILT,
Attorney of Appellant.

On the Brief:

G. DIXON SPEAKMAN,
WILLARD G. WOELPER.

Newark, N. J.
January 31, 1939.



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Supreme Court of the United States

OCTOBER TERM, 1938.

No. 449.

NEWARK FIRE INSURANCE COMPANY,
Appellant,

vs.

STATE BOARD OF TAX APPEALS and
THE CITY OF NEWARK,
Respondents.

BRIEF OF APPELLANT.

I.

The Opinions of the Courts Below.

The Essex County Board of Taxation rendered no formal opinion.

The opinion of the State Board of Tax Appeals is not reported officially, but is contained in the record (R. 4).

The opinion of the Supreme Court of New Jersey is reported in 118 N. J. L. 525 (R. 22).

The *per curiam* opinion of the Court of Errors and Appeals of New Jersey is reported in 120 N. J. L. 224 (R. 7).

II.

Statement of the Case.

This appeal brings up for review the judgment of the Court of Errors and Appeals of New Jersey, entered May 31, 1938, sustaining an *ad valorem* personal property assessment in the amount of \$1,069,000.00 and the tax levied thereon by the respondent City of Newark for the year 1935 against appellant's intangible personal property, which had acquired a business situs at appellant's commercial domicile in New York.

Respondent imposed the assessment and levied the tax under the following sections of Chapter 236 of the Laws of 1918 of New Jersey:

"All property, real and personal, within the jurisdiction of this State, not expressly exempted by this act or excluded from its operation, shall be subject to taxation annually under this act at its true value, and shall be valued by the assessors of the respective taxing districts. Property omitted by the assessors may be assessed as hereinafter provided. All property shall be assessed to the owners thereof with reference to the amount owned on the first day of October in each year, and the persons so assessed for personal property shall be personally liable for the taxes thereon." (Section 202, p. 848).

"The tax on all tangible personal property in this State and on all taxable personal property of non-residents of this State shall be assessed in and for the taxing district where such property is found. The tax on other personal property shall be assessed on each inhabitant in the taxing district where he resides on the first day of October in each year. • • •"

(Section 301, p. 853, as amended by Chapter 310 of the Laws of 1920.)

"Every fire insurance company and every stock insurance company other than life insurance shall be assessed in the taxing district where its office is situated, upon the full amount of its capital stock paid in and accumulated surplus; the real estate belonging to every such corporation, however, shall be taxed in the taxing district where such real estate is situated, and the amount of assessment upon said real estate shall be deducted from the amount of any assessment made upon the capital stock and accumulated surplus, as herein provided for; no franchise tax shall be imposed upon any such fire insurance company or other stock insurance company included in this section." (Section 307, p. 858.)

The tax under the act is a personal property tax on the intangible property of appellant. (Opinion of New Jersey Supreme Court R. 23.) Applying the method set forth in *People's Fire Insurance Co. v. Parker, Receiver*, 34 N. J. L. 479 (Sup. Ct. 1870), affirmed 35 N. J. L. 575 (E. & A. 1871), and *Trenton v. Standard Fire Ins. Co.*, 77 N. J. L. 757 (E. & A. 1909), the assessment was computed upon the total intangible assets of appellant after deducting debts and exemptions allowed by law.

These proceedings were initiated by the appellant by filing a petition to set the assessment aside with the Essex County Board of Taxation, which sustained the assessment and the levy of the tax without formal opinion. An appeal was taken from this judgment to the State Board of Tax Appeals, where, after a hearing *de novo*, the assessment and the levy were again sustained. On certiorari, the New Jersey Supreme Court sustained this judgment. On

appeal, the judgment of the Supreme Court was affirmed by the Court of Errors and Appeals of New Jersey.

Before each of the tax boards and each of the appellate courts, appellant urged that the taxing statutes quoted above, as construed and applied, deprived it of its property without due process of law in violation of the 14th Amendment to the Constitution of the United States. Each of the tax boards and each of the appellate courts considered this question and decided it adversely to the appellant. The determination of this question in appellant's favor would have been a holding that there was no jurisdiction to tax and would have been dispositive of the whole case.

The facts involved in this controversy are not in dispute. The appellant is a corporation organized under the laws of the State of New Jersey, and engaged in the fire insurance business, with its business situs or commercial domicile in the State of New York. As required by the laws of New Jersey, it has designated 41 Clinton Street, Newark, as its registered office in the State of New Jersey. Here it maintains, however, only a local or regional claim and underwriting department of the Counties of Essex, Union, Bergen and Hudson in New Jersey. Since 1929 the appellant's main office has been located at 150 William Street, New York City, where all the books of the corporation are kept (except the stock and transfer books which are required by the laws of New Jersey to be kept in New Jersey). Its executive officers are employed at its executive or main office in New York City. It is there also that the appellant maintains its general accounting and underwriting offices, and it is there that the general accounts of the company are kept. It is there also that all of the general affairs of the company are conducted. All the cash and the

securities of the company are kept there or in banks in New York City or other banks outside of New Jersey with the exception of a small sum on deposit in New Jersey (equal to about 1% of the company's cash deposits) (R. 15, 16). The company pays a franchise tax in New York based upon premiums, but pays no personal property tax there (R. 20).

There are no executive offices at the Newark office and all reports on the local business conducted there are sent to New York. The appellant, having assets of \$8,178,316.89, has no personal property, tangible or intangible, within the State of New Jersey, with the exception of a bank deposit of \$6,425.32 and furniture having a value of \$1,500.00 (R. 15, 16).

Three successive tribunals, the State Board of Tax Appeals, the Supreme Court and the Court of Errors and Appeals, found that appellant's commercial domicile and the business situs of its intangible personal property taxed by the City of Newark were located in New York (R. 5; 8, 23, 28). This is demonstrated by the opinion of the Supreme Court, where Mr. Justice Perskie, in disposing of the constitutional question, said (R. 23):

"This question must, in light of the proofs, be considered upon the inescapable premise that prosecutor had its business *situs* as of October 1st, 1934, and still has it, in New York; that the securities, the personalty involved, have become an integral part of its business *situs* in New York; but that prosecutor pays no personal property tax to the State of New York."

All three tribunals held, however, that the intangible personal property was subject to taxation in the State of

New Jersey by the City of Newark. All three tribunals rested their judgment upon the fiction of *mobilia sequuntur personam* in reliance upon the decisions of this Court in *Cream of Wheat Co. v. County of Grand Forks*, 253 U. S. 325 (1920) and *Citizens National Bank of Cincinnati v. Durr*, 257 U. S. 99 (1921). The New Jersey Supreme Court and the Court of Errors and Appeals, which adopted the opinion of the Supreme Court in a *per curiam* affirmance, although sustaining the assessment at the same time stated that doubts had been cast upon the applicability of the fiction in recent decisions of this Court. Mr. Justice Perskie, speaking for the New Jersey Supreme Court, expressed these doubts succinctly as follows (R. 25):

"In so holding the Court was very careful to point out, notwithstanding its holding in the *Cream of Wheat* case, that the question involving the right of the domiciliary state to tax when the 'business situs' exception applied is an open one. Decision thereof has been expressly reserved *cf. Farmers Loan and Trust Co. v. Minnesota*, *supra* (at p. 213), and *First National Bank of Boston v. Maine*, *supra* (at p. 331). While this doubt has been cast by the highest court of our land, that body has never expressly overruled its decision in the *Cream of Wheat* case. Until such time as that case is reconsidered, we are bound by its holding that there is a sufficient interrelation between the state of the domicile and the intangibles which have acquired a business situs elsewhere to justify the imposition of a personal property tax by the former upon the latter."

The question presented on this appeal is a substantial one, and cannot be considered solely from the standpoint of the interests of the appellant. It is of great general

importance and affects countless numbers of taxpayers similarly situated. Since this case was docketed, in New Jersey alone the taxing authorities have instituted proceedings to make assessments in the amount of five billions of dollars against corporations which maintain only a registered office within this State. Substantially all of the intangible personal property sought to be assessed is situated outside of the State of New Jersey. The importance of the problem is indicated by the fact that in Jersey City the assessments sought to be imposed in the amount of \$4,362,385,100.00 involve taxes on such intangible personal property in the sum of \$199,952,821.00, while in Newark such assessments in the amount of \$570,000,000.00 involve taxes totaling \$23,553,800.00.¹

III.

Specification of Errors.

The judgment of the Court of Errors and Appeals of New Jersey in affirming the judgment of the New Jersey Supreme Court and in holding that the assessment levied by the City of Newark under Chapter 236 of the Laws of New Jersey of 1918, sections 202, 301 and 307, against the intangible personal property of petitioner for taxes for the year 1935 is a valid assessment, was erroneous and illegal because the commercial domicile of appellant and the business situs of the property taxed was located in New York beyond the jurisdiction of the taxing district. These sec-

¹ New York Times, November 24, 1938, p. 33, col. 2 (Late City Edition); New York Times, November 30, 1938, p. 4, cols. 2 and 3 (Late City Edition); New York Times, December 1, 1938, p. 20, col. 4 (Late City Edition).

tions of the taxing statute as construed and applied by the Court of Errors and Appeals of the State of New Jersey deprive the petitioner of its property without due process of law and are repugnant to the 14th Amendment to the Constitution of the United States.

IV.

ARGUMENT.

POINT I.

Sections 202, 301 and 307 of Chapter 236 of the Laws of New Jersey of 1918, as construed and applied by the Court of Errors and Appeals of the State of New Jersey deprive the appellant of its property without due process of law and are repugnant to the 14th Amendment to the Constitution of the United States.

Appellant contends that where a corporation has acquired a commercial domicile in a state other than the state of incorporation, and its intangible personal property has likewise acquired a business situs there and has become an integral part of its commercial domicile, the intangible personal property is no longer within the taxing jurisdiction of the state of incorporation, but is within the taxing jurisdiction of the state of the situs alone. Taxation of such property by any other state deprives the taxpayer of his property without due process of law in violation of the 14th Amendment to the Constitution of the United States. This is so whether or not the state of the commercial domicile or of the business situs of the intangibles exercises its jurisdiction to tax the intangibles.

A.

The Business Situs of the Intangibles Taxed Is in New York, and New Jersey Therefore Has No Jurisdiction to Tax.

A review of the development and changes in the law of taxation, and more particularly of the laws of jurisdiction to tax, demonstrates that the old fiction *mobilia sequuntur personam*, formerly adequate for all purposes and still adequate where the property has acquired no business situs, no longer meets the complex demands of a highly developed commercial and industrial nation.

In early feudal times, the chief item of wealth was real estate, and it was not strange that such property should have been the chief source of revenue. Personal property was of comparative insignificance as an item of wealth and was therefore relatively unimportant in the field of taxation. Moreover, the taxation of personal property involved serious practical problems which dated back to the Dark Ages. Much of such wealth consisted of gold and jewels which could easily be secreted and which could easily be moved from one jurisdiction into another. Difficulties were frequently encountered in the inability of the taxing authority at the situs to discover the identity of the owner.

The common law of succession to personal property had solved the problem of conflict of jurisdiction by the adoption of a legal fiction, the now familiar *mobilia sequuntur personam*. By analogy and without its application being questioned, this doctrine, obviously a rule of convenience, was adopted in the field of taxation, and the state of the domicile of the owner of personal property assumed juris-

diction to tax all of his property, tangible and intangible, regardless of its situs. In view of the relative unimportance of personal property, the fiction was adequate to satisfy the needs of the times.

The Industrial Revolution effected a tremendous increase in tangible personal property, and the growth of corporations a correspondingly great increase in intangible personal property. At the same time the functions of government increased and the states made greater efforts to reach this new source of revenue. The heavy tax burden thus imposed upon this now important item of wealth caused a partial reconsideration of the problem. It was pointed out that where tangible personal property had acquired a permanent situs in a state other than that of the domicile, it was eminently fair to permit the state of the situs to impose a tax, since the property and its owner enjoyed the protection of the laws of that state. Every real advantage of the ownership of such property was secured and protected by the state of the situs, and it was not at all unreasonable to permit that state to impose a tax. *Pullman's Palace Car Company v. Commonwealth of Pennsylvania*, 141 U. S. 18 (1891).

The state of the domicile of the owner, however, refused to abandon the fiction of *mobilia sequuntur personam* and continued to impose its own tax upon the same property upon the basis of domicile, and a new economic problem as to personal property was born—double taxation. For a time the constitutional validity of this practice went unquestioned—indeed as late as 1886 Mr. Justice Bradley considered it “hardly necessary to cite authorities on a point so elementary” *Coe v. Errol*, 116 U. S. 517 (1886).

With the rapid development of the Machine Age came an ever increasing burden of multiple taxation upon tangible personal property. Under a growing storm of economic protest, directed primarily against double taxation, our jurisprudence considered and developed new concepts of jurisdiction to tax. It was a foregone conclusion that the fiction would yield to reality and it was not surprising that it was determined that only the state of the situs had jurisdiction to tax tangible property. This Court had already held that the state of the domicile of the owner could not tax realty outside of the state, *Louisville & Jefferson Ferry Co. v. Kentucky*, 188 U. S. 385 (1903), and it was logical to treat tangible personal property with the same realism. Accordingly in *Union Refrigerator Transit Company v. Kentucky*, 199 U. S. 194 (1905), this Court held that tangible personal property that had acquired a permanent situs in a state other than the domicile of the owner was not subject to taxation in the domiciliary state. In so holding, the Court said (p. 202):

“The power of taxation, indispensable to the existence of every civilized government, is exercised upon the assumption of an equivalent rendered to the taxpayer in the protection of his person and property, in adding to the value of such property, or in the creation and maintenance of public conveniences in which he shares, such, for instance, as roads, bridges, sidewalks, pavements, and schools for the education of his children. If the taxing power be in no position to render these services, or otherwise to benefit the person or property taxed, and such property be wholly within the taxing power of another state, to which it may be said to owe an allegiance and to which it looks for protection, the

taxation of such property within the domicile of the owner partakes rather of the nature of an extortion than a tax, and has been repeatedly held by this court to be beyond the power of the legislature and a taking of property without due process of law. *Railroad Company v. Jackson*, 7 Wall. 262; *State Tax on Foreign-held Bonds*, 15 Wall. 300; *Tappan v. Merchants' National Bank*, 19 Wall. 490, 499; *Delaware &c. R. R. Co. v. Pennsylvania*, 198 U. S. 341, 358."

And continued later in the opinion as follows (page 204):

"It is also essential to the validity of a tax that the property shall be within the territorial jurisdiction of the taxing power. Not only is the operation of State laws limited to persons and property within the boundaries of the State, but property which is wholly and exclusively within the jurisdiction of another State, receives none of the protection for which the tax is supposed to be the compensation. This rule receives its most familiar illustration in the cases of land which, to be taxable, must be within the limits of the State. Indeed, we know of no case where a legislature has assumed to impose a tax upon land within the jurisdiction of another State, much less where such action has been defended by any court. It is said by this court in the *Foreign-held Bond case*, 15 Wall. 300, 319, that no adjudication should be necessary to establish so obvious a proposition as that property lying beyond the jurisdiction of a State is not a subject upon which her taxing power can be legitimately exercised.

The argument against the taxability of land within the jurisdiction of another State applies with equal cogency to tangible personal property beyond the jurisdiction. It is not only beyond the sovereignty of the taxing State, but does not and cannot receive

protection under its laws. True, a resident owner may receive an income from such property, but the same may be said of real estate within a foreign jurisdiction. Whatever be the rights of the State with respect to the taxation of such income, it is clearly beyond its power to tax the land from which the income is derived. As we said in *Louisville &c. Ferry Co. v. Kentucky*, 188 U. S. 385, 396: 'While the mode, form and extent of taxation are, speaking generally, limited only by the wisdom of the legislature, that power is limited by the principle inhering in the very nature of constitutional Government, namely, that the taxation imposed must have relation to a subject within the jurisdiction of the taxing Government.' "

It is significant that at no place in this opinion does it appear that there was double taxation present. Whether there was actual double taxation present is of no consequence because the principle of the case is so just, as well as so logical, and has become so firmly embedded in our jurisprudence that no one today would seriously contend that the state of the domicile of the owner could impose a property tax on tangible property that had acquired a situs in another state, even if the latter state did not impose a tax upon the property.

Within twenty years the principle of the *Union Refrigerator* case was developed still further and was extended in *Frick v. Pennsylvania*, 268 U. S. 473 (1925) to apply to the imposition of an inheritance tax upon tangible property which had acquired a situs in a state other than that of the domicile of the decedent. In the *Frick* case, Mr. Justice Van Devanter writing for a unanimous Court held (page 492):

"The tax which it imposes is not a property tax, but one laid on the transfer of property on the death of the owner. This distinction is stressed by counsel for the State. But, to impose either tax, *the State must have jurisdiction over the thing that is taxed, and to impose either without such jurisdiction is mere extortion, and in contravention of due process of law.*"*

The law of jurisdiction to tax tangible property is now well settled, and it is clear that the only state having jurisdiction to impose property taxes or transfer inheritance taxes upon tangible property that has acquired a permanent situs elsewhere is the state of the situs. *Johnson Oil Refining Co. v. Oklahoma*, 290 U. S. 158 (1933); *City Bank Farmers Trust Co. v. Schnader*, 293 U. S. 112 (1934).

For purposes of tax jurisdiction no logical distinction can be made between tangible personal property that has acquired a permanent situs in a state other than that of the domicile, and intangible personal property that has acquired a business situs in a state other than that of the domicile. Analytically, ownership of tangible property is itself merely a collection of intangible rights that a person has with relation to some physical object. Similarly, ownership of intangible property is merely a collection of similar intangible rights that a person has with relation to other persons.

When the courts first considered the problem of intangible personal property, however, they were troubled by the impossibility of actually fixing any physical situs of intangibles, and relied exclusively upon *mobilia sequuntur personam*. In time, however, as in the case of tangibles, various states actually conferring benefits upon

* Italics ours.

intangibles and the owners thereof attacked the fiction and claimed jurisdiction to tax. As early as 1899 this Court held that the fiction must yield to reality and recognized and applied the concept of business situs of intangibles to support jurisdiction to tax. *New Orleans v. Stempel*, 175 U. S. 309 (1899); *Bristol v. Washington County*, 177 U. S. 133 (1900); *State Board v. Comptoir National D'Escompte*, 191 U. S. 388 (1903); *Metropolitan Life Insurance Company v. New Orleans*, 205 U. S. 395 (1907); *Liverpool and L. & G. Co. v. Board of Assessors*, 221 U. S. 346 (1911).

It must be remembered that at this time it was generally considered that there was no constitutional objection to taxing tangible or intangible property more than once, and consequently the foregoing decisions were no indication that the state of the domicile might not continue to impose taxes by employing the fiction. In fact this practice continued to flourish with reference to tangibles until the decision of this Court in the *Union Refrigerator* case placed tangible property, which had acquired a situs elsewhere, beyond the taxing jurisdiction of the state of the domicile (*supra*, p. 11).

In the case of tangible property possibilities of jurisdiction were rather definitely limited to physical situs and domicile, but as to intangibles the situation was infinitely more complex and there were many more possible theories of jurisdiction to tax. The result was therefore not merely double taxation but multiple taxation.

The plain truth of the matter is that it is impossible to attribute any actual physical situs to intangibles as such. Actual situs as to tangible property is an essential in the law of jurisdiction, because it is the state of the situs which

predominately protects the property and which permits the owner to enjoy his rights with respect thereto. To describe this situation with reference to intangibles the term "business situs" is employed. Where intangible personal property has been localized and is being used and beneficially employed under the laws and protection of one state, it is said that the intangible property has acquired a business situs in that state. One writer expresses this idea of tax situs of intangibles by saying that it is the place where the property is integrated in the body of the property of the state and where it becomes useful wealth.* Mr. Chief Justice Hughes defined the term in *New York ex rel. Whitney v. Graves*, 299 U. S. 366, at 372 (1937), where he said:

"When we speak of a 'business situs' of intangible personal property in the taxing State we are indulging in a metaphor. We express the idea of localization by virtue of the attributes of the intangible right in relation to the conduct of affairs at a particular place. The right may grow out of the actual transactions of a localized business or the right may be identified with a particular place because the exercise of the right is fixed exclusively or dominantly at that place."

In view of the difficulties in fully developing this theory of tax situs for intangibles, the law of jurisdiction to tax intangibles did not keep pace in its development with the law as to tangibles, and it is not surprising therefore that in *Union Refrigerator Transit Co. v. Kentucky*, *supra*, the dictum of the Court indicated that intangibles should not be treated in the same manner as tangibles.

* Harding, *Double Taxation of Property and Income*, Cambridge 1933.

It was at this stage in the development of the law that this Court handed down its decision in *Cream of Wheat Co. v. County of Grand Forks*, 253 U. S. 325 (1920), where it held that intangibles were still taxable at the domicile of the owner on the basis of *mobilia sequuntur personam*, even though they had acquired a situs elsewhere.

The following year in *Citizens National Bank v. Durr*, 257 U. S. 99 (1921), the majority of the Court, relying upon *mobilia sequuntur personam*, sustained a personal property tax imposed by Ohio upon a New York Stock Exchange seat owned by a person domiciled in the State of Ohio and held that its decision would not be different even if it were assumed that the property had acquired a situs for taxation in New York. This case, however, brought forth one of the first indications that intangible personal property should be subject to taxation only in the state of its business situs. Mr. Justice Holmes in a dissent, in which Mr. Justice McReynolds and Mr. Justice Van Devanter joined, said (page 110):

“The question whether a seat in the New York Stock Exchange is taxable in Ohio consistently with the principles established by this Court seems to me more difficult than it does to my brethren. All rights are intangible personal relations between the subject and the object of them created by law. But it is established that it is not enough that the subject, the owner of the right, is within the power of the taxing State. He cannot be taxed for land situated elsewhere, and the same is true of personal property permanently out of the jurisdiction. It does not matter, I take it, whether the interest is legal or equitable, or what the machinery by which it is reached, but the question is whether the object of the

right is so local in its foundation and prime meaning that it should stand like an interest in land. If left to myself I should have thought that the foundation and substance of the plaintiff's right was the right of himself and his associates personally to enter the New York Stock Exchange building and to do business there. I should have thought that all the rest was incidental to that and that that on its face was localized in New York. If so, it does not matter whether it is real or personal property or that it adds to the owner's credit and facilities in Ohio. The same would be true of a great estate in New York land."

It is important to note, moreover, that when *Cream of Wheat Company v. County of Grand Forks* and *Citizen's National Bank v. Durr* were decided, the law of jurisdiction to tax had not yet fully developed even as to tangible property. It was not until 1925 that the principle of the *Union Refrigerator* case was extended to an inheritance tax in *Frick v. Pennsylvania*, 268 U. S. 473 (*supra*, p. 13), and the doctrine of *mobilia sequuntur personam* was further limited. By 1925, therefore, the law of jurisdiction to tax tangible personal property had fully developed, and it was clear that where property had acquired a permanent situs elsewhere the state of the domicile no longer had jurisdiction to tax on the basis of *mobilia sequuntur personam*.

The development of the law of jurisdiction to tax intangibles from this point on demonstrates that the logic and reasonableness of the rule of jurisdiction to tax tangibles applies with equal force to the taxation of intangibles which have acquired a business situs elsewhere.

Thus in 1929 in *Safe Deposit & Trust Company v. Virginia*, 280 U. S. 83, Mr. Justice McReynolds, speaking for

the majority of the Court, attacked the arbitrary application of *mobilia sequuntur personam* to intangibles. In holding that the state of the domicile of the equitable owner of intangible property situated elsewhere could not impose a tax on such property, he said (page 92):

“Ordinarily this Court recognizes that the fiction of *mobilia sequuntur personam* may be applied in order to determine the situs of intangible personal property for taxation. *Blodgett v. Silberman*, 277 U. S. 1. But the general rule must yield to established fact of legal ownership, actual presence and control elsewhere, and ought not to be applied if so to do would result in inescapable and patent injustice, whether through double taxation, or otherwise. *State Board of Assessors v. Comptoir National d'Escompte*, 191 U. S. 388, 404; *Buck v. Beach*, 203 U. S. 392, 408; *Liverpool & L. & G. Ins. Co. v. Orleans Assessors*, 221 U. S. 346, 354; *Maguire v. Trefry*, 253 U. S. 12, 17. . . .

A statute of a State which undertakes to tax things wholly beyond her jurisdiction or control conflicts with the Fourteenth Amendment [citations omitted].

Tangible personal property permanently located beyond the owner's domicile may not be taxed at the latter place. *Union Refrig. Transit Co. v. Kentucky*, *supra*; *Frick v. Pennsylvania*, *supra*. Intangible personal property may acquire a taxable situs where permanently located, employed and protected. *New Orleans v. Stempel*, 175 U. S. 309; *Bristol v. Washington County*, 177 U. S. 133; *State Board of Assessors v. Comptoir National d'Escompte*, 191 U. S. 388; *Metropolitan Life Ins. Co. v. New Orleans*, 205 U. S. 395; *Liverpool & L. & G. Ins. Co. v. Orleans Assessors*, 221 U. S. 346.

Here we must decide whether intangibles—stocks, bonds—in the hands of the holder of the legal title with definite taxable situs at its residence, not subject to change by the equitable owner, may be taxed at the latter's domicile in another state. We think not. The reasons which led this court in *Union Refrig. Transit Co. v. Kentucky*, 199 U. S. 194, and *Frick v. Pennsylvania*, 268 U. S. 473, to deny application of the maxim *mobilia sequuntur personam* to tangibles apply to the intangibles in appellant's possession. They have acquired a situs separate from that of the beneficial owners. The adoption of a contrary rule would 'involve possibilities of an extremely serious character' by permitting double taxation, both unjust and oppressive. And the fiction of *mobilia sequuntur personam* 'was intended for convenience, and not to be controlling where justice does not demand it.' "

Again, definite modification of the law of jurisdiction to tax was made by this Court in *Farmers' Loan & Trust Company v. Minnesota*, 280 U. S. 204 (1930) with respect to transfer and inheritance taxes upon intangibles. In that case a succession tax was levied by the State of Minnesota upon Minnesota bonds which had been owned by a domiciliary of New York. It was not claimed that the bonds had acquired a business situs in Minnesota, but it was argued that the bonds had a tax situs there since they were debts of a Minnesota corporation. The majority of the Court, intent upon eliminating the vices of multiple taxation, held the Minnesota tax invalid and expressly overruled *Blackstone v. Miller*, 188 U. S. 189 (1903) which had long been relied upon as supporting the theory that intangibles might be taxed constitutionally both at the domicile of the owner and elsewhere. Mr. Justice McReynolds again writing for a majority of the Court held (page 209) :

"*Blackstone v. Miller, supra*, and certain approving opinions, lend support to the doctrine that ordinarily choses in action are subject to taxation both at the debtor's domicile and at the domicile of the creditor; that two States may tax on different and more or less inconsistent principles the same testamentary transfer of such property without conflict with the Fourteenth Amendment. The inevitable tendency of that view is to disturb good relations among the States and produce the kind of discontent expected to subside after establishment of the Union. The *Federalist*, No. VII. The practical effect of it has been bad; perhaps two thirds of the States have endeavored to avoid the evil by resort to reciprocal exemption laws. It has been stoutly assailed on principle. Having reconsidered the supporting arguments in the light of our more recent opinions, we are compelled to declare it untenable. *Blackstone v. Miller* no longer can be regarded as a correct exposition of existing law; and to prevent misunderstanding it is definitely overruled.

Four different views concerning the situs for taxation of negotiable public obligations have been advanced. One fixes this at the domicile of the owner; another at the debtor's domicile; third at the place where the instruments are found—physically present; and the fourth within the jurisdiction where the owner has caused them to become integral parts of a localized business. If each state can adopt any one of these and tax accordingly, obviously, the same bonds may be declared present for taxation in two, or three, or four places at the same moment. Such a startling possibility suggests a wrong premise."

He indicated clearly that the basic difficulty with the attempt on the part of Minnesota to tax was the lack of jurisdiction, a primary requisite of all taxation, saying (page 210):

"In this Court the presently approved doctrine is that no State may tax anything not within her jurisdiction without violating the Fourteenth Amendment [citations omitted]. Also, no State can tax the testamentary transfer of property, wholly beyond her power, *Rhode Island Trust Co. v. Doughton*, 270 U. S. 69, or impose death duties reckoned upon the value of tangibles permanently located outside her limits. *Frick v. Pennsylvania*, 268 U. S. 473. These principles became definitely settled subsequent to *Blackstone v. Miller* and are out of harmony with the reasoning advanced to support the conclusion there announced.

At this time it cannot be assumed that tangible chattels permanently located within another State may be treated as part of the universal succession and taken into account when estimating the succession tax laid at the decedent's domicile. *Frick v. Pennsylvania* is to the contrary.

Nor is it permissible broadly to say that notwithstanding the Fourteenth Amendment two States have power to tax the same personalty on different and inconsistent principles or that a State always may tax according to the fiction that in successions after death *mobilia sequuntur personam* and domicile govern the whole."

The problem still remained, however, as to which state could tax where intangible personal property had acquired a business situs in a state other than that of the owner's domicile. Was such intangible property only taxable by the state of the situs? The language of the Court even then forecast an affirmative answer (page 211):

"While debts have no actual territorial situs we have ruled that a State may properly apply the rule *mobilia sequuntur personam* and treat them as

localized at the creditor's domicile for taxation purposes. Tangibles with permanent situs therein, and their testamentary transfer, may be taxed only by the State where they are found. And, we think, the general reasons declared sufficient to inhibit taxation of them by two States apply under present circumstances with no less force to intangibles with taxable situs imposed by due application of the legal fiction. Primitive conditions have passed; business is now transacted on a national scale. A very large part of the country's wealth is invested in negotiable securities whose protection against discrimination, unjust and oppressive taxation, is matter of the greatest moment. Twenty-four years ago *Union Refrig. Transit Co. v. Kentucky*, *supra*, declared — ' . . . in view of the enormous increase of such property [tangible personalty] since the introduction of railways and the growth of manufactures, the tendency has been in recent years to treat it as having a *situs* of its own for the purpose of taxation, and cor-
relatively to exempt [it] at the domicile of the owner.' And, certainly, existing conditions no less imperatively demand protection of choses in action against multiplied taxation whether following misapplication of some legal fiction or conflicting theories concerning the sovereign's right to exact contributions. For many years the trend of decisions here has been in that direction.

Taxation is an intensely practical matter and laws in respect of it should be construed and applied with a view of avoiding, so far as possible, unjust and oppressive consequences. We have determined that in general intangibles may be properly taxed at the domicile of their owner and we can find no sufficient reason for saying that they are not entitled to enjoy an immunity against taxation at more than one place similar to that accorded to tangibles. The

difference between the two things, although obvious enough, seems insufficient to justify the harsh and oppressive discrimination against intangibles contended for on behalf of Minnesota."

The Court was careful to note several of its decisions which (page 213):

"* * * recognize the principle that choses in action may acquire a situs for taxation other than at the domicile of their owner if they have become integral parts of some local business.* The present record gives no occasion for us to inquire whether such securities can be taxed a second time at the owner's domicile."

The holding of this case was confirmed in *Baldwin v. Missouri*, 281 U. S. 586 (1930) and *Beidler v. South Carolina Tax Commission*, 282 U. S. 1 (1930), but in neither case did it appear that the intangibles had acquired a situs in another state, and accordingly the instant problem was left unanswered, although in each case the inference is apparent that if the intangibles had acquired a situs they would be taxable only there.

The problem appears again two years later in the case of *First National Bank of Boston v. Maine*, 284 U. S. 312 (1932) but the Court found no occasion to attempt a solution. Mr. Justice Sutherland said (page 331):

"We do not overlook the possibility that shares of stock, as well as other intangibles, may be so used in a state other than that of the owner's domicile as to give them a *situs* analogous to the actual *situs* of tangible personal property. See *Farmers Loan Company* case, *supra*, at p. 213. That question heretofore

* Italics ours.

has been reserved, and it still is reserved to be disposed of when, if ever, it properly shall be presented for our consideration."

The rule that certain kinds of intangibles such as bonds, notes and credits are subject to inheritance taxes only by the domiciliary state in the absence of a business situs was here extended to apply to stocks.

Approving the line of decisions indicating that intangible property which has acquired a business situs could be constitutionally taxed in only one jurisdiction, this Court in *Wheeling Steel Corporation v. Fox*, 298 U. S. 193 (1936) sustained the right of the State of West Virginia to impose an *ad valorem* property tax on the intangible property of a Delaware corporation that had acquired a business situs at the commercial domicile of the corporation in West Virginia. In sustaining this tax, Mr. Chief Justice Hughes, speaking for the entire Court, first emphasized the necessity of establishing jurisdiction to tax, saying (page 208):

"We have held that it is essential to the validity of such a tax, under the due process clause, that the property shall be within the territorial jurisdiction of the taxing state",

and then continued as follows (page 209):

"When we deal with intangible property, such as credits and choses in action generally, we encounter the difficulty that by reason of the absence of physical characteristics they have no situs in the physical sense, but have the situs attributable to them in legal conception. Accordingly we have held that a State may properly apply the rule *mobilia sequuntur personam* and treat them as localized at the owner's domicile for purposes of taxation. *Farmers Loan &*

Trust Co. v. Minnesota, 280 U. S. 204, 211. And having thus determined 'that in general intangibles may be properly taxed at the domicile of their owner,' we have found 'no sufficient reason for saying that they are not entitled to enjoy an immunity against taxation at more than one place similar to that accorded to tangibles.'" *Id.*, p. 212. The principle thus announced in *Farmers Loan & Trust Co. v. Minnesota* has had progressive application. [Citations omitted.] But despite the wide application of the principle, an important exception has been recognized.

In the case of tangible property, the ancient maxim, which had its origin when personal property consisted in the main of articles appertaining to the person of the owner, yielded in modern times to the 'law of the place where the property is kept and used.' *First National Bank v. Maine*, *supra*. It was in view 'of the enormous increase of such property since the introduction of railways and the growth of manufactures' that it came to be regarded as 'having a situs of its own for the purpose of taxation, and correlatively to [be] exempt at the domicile of its owner.'" *Union Refrigerator Transit Co. v. Kentucky*, *supra*, p. 207. There has been an analogous development in connection with intangible property by reason of the creation of choses in action in the conduct by an owner of his business in a State different from that of his domicile [citations omitted].

These cases, we said in *Farmers Loan & Trust Co. v. Minnesota*, *supra*, p. 213, 'recognize the principle that choses in action may acquire a situs for taxation other than at the domicile of their owner if they have become integral parts of some local business.' We adverted to this reservation in *Beidler*

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v. *South Carolina Tax Comm'n*, *supra*, p. 8, and in *First National Bank v. Maine*, *supra*, p. 331."

In *First Bank Stock Corporation v. State of Minnesota*, 301 U. S. 234 (1937), this Court once again affirmed the doctrine that where intangibles have acquired a business situs they are taxable by the state of such situs. Mr. Justice Stone in delivering the opinion of the Court said (page 238):

"The doctrine that intangibles may be taxed at their business situs, as distinguished from the legal domicile of their owner, has usually been applied to obligations to pay money, acquired in the course of a localized business [citations omitted]. But it is equally applicable to shares of corporate stock which, because of their use in a business of the owner, may be treated as localized, for purposes of taxation, at the place of the business [citations omitted]. Appellant's entire business in Minnesota is founded on its ownership of the shares of stock and their use as instruments of corporate control. They are as much 'integral parts' of the local business as accounts receivable in a merchandising business, or the bank accounts in which the proceeds of the accounts receivable are deposited upon collection. Compare *Wheeling Steel Corp. v. Fox*, *supra*, 212-214. Thus identified with the business conducted by appellant in Minnesota, they are as subject to local property taxes as they would be if the owner were a private individual domiciled in the state."

In concluding his opinion he set forth the basic reasons for the principle contended for by appellant here when he said (page 241):

"The economic advantages realized through the protection, at the place of domicile, of the ownership

of rights in intangibles, the value of which is made the measure of the tax, bear a direct relationship to the distribution of burdens which the tax effects. These considerations support the taxation of intangibles at the place of domicile, *at least where they are not shown to have acquired a business situs elsewhere,** as a proper exercise of the power of government. Like considerations support their taxation at their business situs, for it is there that the owner in every practical sense invokes and enjoys the protection of the laws, and in consequence realizes the economic advantages of his ownership."

In *Smith v. Ajax Pipe Line Co.*, 87 F. (2d) 567 (1937), *certiorari denied* 300 U. S. 677 (1937), a personal property tax levied by the State of Missouri on the bank deposits in New York of a Delaware corporation were sustained upon the principle that these deposits had acquired a business situs at the commercial domicile of the owner in Missouri. Circuit Judge Stone, after reviewing the development of the law of taxation on personal property, concluded that (page 571):

"The final step was to declare that there was but one situs for taxation of intangibles."

In view of the foregoing authorities, it is apparent that this Court does not presently regard *Cream of Wheat Company v. County of Grand Forks*, 253 U. S. 325 (1920) and *Citizen's National Bank v. Durr*, 257 U. S. 99 (1921) as controlling with reference to jurisdiction to tax intangibles which have acquired a business situs. This is indicated by the decision of this Court in *New York ex rel. Whitney v. Graves*, 299 U. S. 366, where Mr. Chief Justice Hughes in

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commenting upon the decision in *Citizen's National Bank v. Durr*, *supra*, remarked (page 373):

" . . . what the Court said with respect to double taxation must be read in the light of the decisions in *Farmers Loan & Trust Co. v. Minnesota*, *supra*, and later cases upon that point. See *Wheeling Steel Corp. v. Fox*, *supra*."

It is therefore submitted that the most recent opinions of this Court have set forth certain basic principles of jurisdiction to tax, which lead to the inescapable conclusion that where intangibles have acquired a business situs, the state of the situs only may tax and the state of the domicile cannot.

Since the concept of business situs with reference to intangibles is now well established, it would seem clear that there is no longer any reason why intangibles should be here treated differently than tangibles. Indeed, all of the considerations which deny to the domicile the jurisdiction to tax tangibles that have a situs elsewhere, compel the adoption of a similar rule with reference to intangibles. This result has already been reached by several of our state courts following the trend of the decisions of this Court already referred to.

Thus, the Indiana Supreme Court in *Miami Coal Co. v. Fox*, 203 Ind. 99 (1931), held (page 113):

"It has been suggested by the Supreme Court of the United States that, if the principles of taxation were homogeneous throughout the country and the individual states, property would be subject to taxation in but one of such jurisdictions. This is the foundation for the inference that property, such as here in question, ought to have one situs and one

situs only. Either the gaining of a so-called business situs should emancipate the property from taxation at the domicile of the owner, or the judicial construction of the principle upon which the so-called business situs is founded should be abolished. *Kidd v. Alabama* (1903), 188 U. S. 730, 732, 23 S. Ct. 401, 47 L. ed. 669; *Hawley v. City of Malden* (1914), 232 U. S. 1, 34 S. Ct. 201, 58 L. ed. 477, Ann. Cas. 1916C, 842.

The contention of appellees under the last question stated is peculiar and unique in contending that intangible personal property may have two situs, one a business situs and the other a taxable situs.

Admitting that the property has a business situs in Illinois and a taxable situs in Indiana, the only foundation for the property being subject to taxation is the ancient maxim *mobilia sequuntur personam*. The seed of this maxim was not begotten by taxation. The rule is but a legal fiction to the effect that for legal purposes the situs or home of personal property is always at the domicile of its owner. But this maxim may not be a premise or used in reasoning to the determination of the situs of the property for the purpose of taxation. This is exemplified by the holding of the United States Supreme Court that the taxation of tangible personal property in the jurisdiction of the domicile of its owner, when it has an established legal situs in another jurisdiction, offends the Fourteenth Amendment to the United States Constitution. *Safe Deposit, Etc., Co. v. Virginia* (1929), 280 U. S. 83, 92, 50 S. Ct. 59, 74 L. ed. 180, 67 A. L. R. 386. And it has been further held that this principle applies to intangible as well as to tangible personal property. *Marshall-Wells Hardware Co. v. Multnomah County*, *supra*, page 472. By virtue of the statutes cited, if the same statutes were in force and effect in Illinois,

intangible personal property belonging to a person domiciled in Indiana who was connected with the business in Illinois would be taxable in Illinois under Indiana decisions. *Herron v. Keeran, supra; Buck v. Miller, supra.*

If the contention of appellees were true, the property could also be lawfully taxed in Indiana. Indiana has assessed for taxation intangible personal property localized in this state, the owner having his domicile in another jurisdiction. In permitting such taxation, as was done with the property in the case of *Buck v. Miller, supra*, it is tantamount to saying that the taxation situs of the intangible personal property for the purpose of taxation was within the jurisdiction of Indiana. We cannot, without excluding justice from our conscience, adjudge anything different concerning the property of our own citizens similarly situated in other states. *And it does not matter to reach such a conclusion whether such property was taxed in such foreign jurisdiction or not, or even whether it was subject to taxation.** Appellees' contention that the property was within the jurisdiction of Indiana subject to taxation even though it gained a business situs in Illinois must be held as not well founded."

Again, in *Commonwealth of Kentucky v. West India Oil Refining Company*, 138 Ky. 828 (1910), the Court was considering the validity of a personal property tax levied against a Kentucky corporation which had a "principal place of business" in the state. The proofs showed that the real business of the company and its commercial situs were in Cuba and Porto Rico. The tax statute specifically provided that the entire personal property, tangible and intan-

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gible, of corporations organized in the state should be taxed wherever the property might be. The Court refused to follow the argument that Kentucky could tax as the state of the domicile, and pointed out the basic difficulty was the lack of jurisdiction, holding (page 834):

"The question in this case is not therefore whether the property in question has been taxed in Cuba or Porto Rico. The question is simply, Is it taxable here? If it has not been taxed there, it may still be taxed there. If not, that fact will not confer jurisdiction to tax it here. . . .

The business of the corporation was carried on entirely outside of Kentucky. Its property, though intangible, had no situs in Kentucky. It was never here. It was taxable where the business was carried on. If it could be taxed there and elsewhere, it would be twice taxed. It cannot be taxed here unless within the jurisdiction of the state under the repeated decisions of the United States Supreme Court. No practical distinction can be drawn between the money of the company in its office in Cuba or that deposited in a bank there, or that due on its books for its product which has been sold and not paid for. It is all employed in the business in Cuba or Porto Rico. It has its situs there. It has no situs in Kentucky."

The principle of this case was applied in *Commonwealth v. B. F. Avery & Sons*, 163 Ky. 828 (1915), where a tax was imposed upon certain intangible property of a domestic corporation. The property had become localized with the business of the corporation's local branches outside of the state. The Kentucky Court held that the property had a business situs outside of the state and therefore was beyond the tax jurisdiction of Kentucky, saying (page 829):

"It is no longer open to dispute that tangible personal property actually present in another state so as to acquire there a situs for taxation, is immune from taxation at the domicile of the owner. *D. L. & W. v. Pennsylvania*, 198 U. S. 341; *Union Ref. Co. v. Kentucky*, 199 U. S. 194, 26 Sup. Ct. 36, 50 L. ed. 150, 4 Ann. Cas. 493. And this rule has been extended to accounts receivable. *Commonwealth v. West India Oil Refining Co.*, 138 Ky. 828, 129 S. W. 301. In the last named case, however, the corporation employed its whole capital outside of this state; but we are unable to see any practical distinction between such state of fact and that existing in the present case, where the corporation employs only part of its capital in other states. As to that part so employed there is immunity from taxation in this state."

The holding of *Commonwealth of Kentucky v. West India Oil Refining Co.*, 138 Ky. 828 (*supra*) was followed in *Commonwealth of Kentucky v. Madden's Ex'r.*, 265 Ky. 684 (1936) where the state tried to tax a domiciliary upon his interest in a partnership doing business in New York. The court held that the intangible property had acquired a situs in New York and was not within the tax jurisdiction of Kentucky, saying (page 686):

"Any doubt that may have existed by virtue of the recent decisions of the Supreme Court of the United States, as to whether or not the maxim of '*mobilia sequuntur personam*' would be invariably applied to intangible property and 'business situs' no longer recognized, has been set at rest by the decision of that court in the case of *Wheeling Steel Corp. v. Fox*, 56 S. Ct. 773, 776; 80 L. ed. 1143 (decided May 18, 1936) . . .

Applying these principles to the case at bar, we are compelled to recognize that the business of the

Madden partnership was located in New York. All of the partnership accounts were carried with brokers there, the securities purchased and sold were carried in the names of New York brokers, and the trading was almost universally carried on in person by Mr. Madden at the brokerage offices. In fact, the testimony indicates that he was more often sojourning in New York than in his technical legal residence in Kentucky. We conclude, therefore, that Mr. Madden's interest in the assets of the partnership was localized in New York and beyond the power of Kentucky to tax. His interest in the going partnership was not a thing apart from the partnership itself."

The Supreme Court of the State of Virginia had occasion to consider the problem in *Commonwealth v. Appalachian Electric Power Co.*, 159 Va. 462 (1932), cert. denied 288 U. S. 613 (1933). In that case a Virginia corporation had created a trust in New York conveying all of its property, tangible and intangible, to the New York trustee. The State of Virginia attempted to tax the intangible personal property upon *mobilia sequuntur personam*. The Court held that the intangibles had acquired a business situs in New York and were no longer within the tax jurisdiction of Virginia, saying (page 465 *et seq.*):

"* * * in our opinion, the recent decisions of the Supreme Court of the United States extending the application of the Fourteenth Amendment to the Constitution of the United States are clearly decisive of the case. * * *

The conclusions from these opinions summarized by counsel for petitioner seem inescapable: (1) that no property can be subjected to taxation by more than one State; (2) that this rule likewise applies to a tax on inheritances; (3) that the tax situs of tangi-

bles (like real estate) is in the State where they are located, the fiction of *mobilia sequuntur personam* being no longer applicable to tangibles; (4) that where intangibles form the basis of an inheritance tax this fiction applies and such tax is properly imposed in the State of the domicile of the decedent; (5) that, where intangibles are sought to be taxed, the fiction of *mobilia sequuntur personam* may be applied, but this fiction must give way to the fact of legal title, possession and control in another state. . . .

Title, possession and control of the property, for all practical purposes, are beyond the territorial limits of Virginia and within the territorial limits of New York, which under the decisions heretofore cited gives the property in question a taxable situs in the latter State. The fact that interest has been and will be received by petitioner in Virginia, so long as it is not in default, does not affect the right of the State of New York to impose a tax upon this property. [Citations omitted.]”

The Court clearly indicated that the problem was one of jurisdiction and not of double taxation (page 471):

“The fact that the State of New York imposes no such tax on this class of property is immaterial. The controlling question is, has that State the right to tax the property? We think it has. If so, Virginia, under the decisions, has no such right.”

A similar conclusion was reached by the Supreme Court of Montana in *State v. Harrington*, 68 Mont. 1 (1923), rehearing denied (1923). In this case Montana assessed a personal property tax against one of its domiciliaries for stock which he used in a brokerage business in New York.

The court in an exhaustive and well-considered opinion held that the intangibles had acquired a business situs in New York and were beyond the tax jurisdiction of Montana.

After a careful review of the authorities, the court held (page 28):

"But as indicated above, there is a well-recognized exception to the general rule that intangibles have their *situs* at the domicile of their owner, as where there is such a combination of circumstances 'as produce what is referred to in the books as a business *situs* as distinguished from the domicile of the owner.' [Citations omitted.]

The general principle underlying this exception has been recognized by the Supreme Court of the United States in many cases [citations omitted], and so far as we are aware has never been denied by that court. * * *

In the instant case it is unquestioned that the Thornton shares have a business *situs* in the state of New York; they are actually there and always have been. Under the admitted facts it must be held under the policy so long maintained in the territory and state of Montana, which we believe to be consonant with the true principles governing taxation—a policy which frowns upon double taxation in any form, and which simply demands of persons a just contribution to the support of the government under which they enjoy the protection which makes their business possible—the assessment of the Thornton stocks is not commanded."

A month after this opinion was rendered the Attorney General of Montana moved for a rehearing on the ground that the decision should be different since New York did not tax the property and there was consequently no double

taxation involved. The Court denied the motion, clearly indicating that it conceived the problem to be one of jurisdiction and not of double taxation. The Court held (page 32):

"The only question presented or which could be presented to us in this case is whether under our laws the stocks are subject to the taxing jurisdiction of this state. Upon the agreed facts as counsel have made up the record, there is not a Montana dollar invested in the Thornton stocks. As a fact, as distinguished from fiction, they are as foreign to our jurisdiction as if they were cattle browsing upon the Adirondack hills. The stocks were bought with New York money, and are part of a New York business. Yet in view of these facts the attorney general asserts that the court's opinion is not consonant with the trend of modern authority. In this he is in error; the contrary is the fact. As noted in the opinion, the ancient fiction *mobilis sequuntur personam*, while satisfactory under the primitive conditions of the middle ages, is not suited to modern business conditions as a rule of universal application. The law has developed progressively beyond the narrow limits of the maxim. The fact is that the rule growing out of the business *situs* of intangibles, as distinguished from the domicile of the owner, is not only consistent with the trend of modern judicial authority, but is of well-nigh universal application in this country."

The New York Court of Appeals in *Matter of Brown*, 274 N. Y. 10 (1937) (*reargument denied* June 1937, 274 N. Y. 634) in setting aside an inheritance tax imposed upon the intangibles of the decedent domiciled in New York which had acquired a business situs in Colorado said (page 21):

"It is clear that it is intended to include within the gross estate of a decedent domiciled within the State of New York at the time of his death intangible property *wherever situate*, without reference to the fact that it may have acquired and had an actual or business *situs* outside of the State of New York. The state has no power to tax property located beyond its jurisdiction. (*Matter of Swift, supra.*) To the extent that it has attempted to do so, it must be held that the statute in question is in violation of the due process provision of the Fourteenth Amendment, and is unconstitutional and void."

Other decisions supporting these views are *Middlekauff v. Galloway*, 151 Ore. 671 (1935); *Buck v. Board of Com'rs. of Miami County*, 103 Kan. 270 (1918); *Poppleton v. Yamhill County*, 18 Ore. 469 (1890); *Mayor and City Council of Baltimore v. Gibbs*, 166 Md. 364 (1934), *cert. denied* 293 U. S. 559 (1934); *Nashville Trust Co. v. Stokes* (Tenn.) 118 S. W. (2d) 228 (1938).

The concepts of jurisdiction set forth in the foregoing decisions of this Court and of the state courts are sound. They demonstrate that when intangibles have acquired a business *situs* there is no longer any reasonable basis for taxing them upon the theory of *mobilia sequuntur personam*. The fiction can be employed to give jurisdiction to tax only where the property sought to be taxed has no *situs*. Where intangibles have acquired a business *situs*, as in this case, the reason for the employment of the fiction no longer obtains. It follows here that the fiction must be abandoned and the jurisdiction to tax denied. It is therefore submitted that the intangibles here taxed are no longer within the tax jurisdiction of the State of New Jersey, and

the judgment of the Court of Errors and Appeals of New Jersey sustaining the imposition of the property tax upon this intangible property should be reversed.

B.

The Tax Domicile of the Appellant Is in New York and New Jersey Therefore Has No Jurisdiction to Tax.

Recent decisions of this Court indicate that New Jersey has no jurisdiction to tax appellant's intangible property by *mobilia sequuntur personam*, because appellant's commercial domicile is in New York.

Corporations for many purposes are said to be domiciled in the state of their incorporation, but this is a fiction which results in manifest incongruity in taxation where a corporation has acquired a commercial domicile elsewhere.

The considerations which may be urged to support the jurisdiction of the domicile to tax natural persons do not apply to corporations. The domicile of a natural person is where he makes his home, where he ordinarily spends most of his time and enjoys most of his property.

The registered office of a New Jersey corporation, however, which has its commercial domicile in New York can hardly be compared to the domicile of a natural person. The true home of this corporation, insofar as it can be said to have a home, is in New York at its commercial domicile. It is there that the vital acts of its existence are carried on.

Can New Jersey attribute to itself as the chartering state the entire intangible wealth of the corporation? Admittedly, New Jersey has given appellant its corporate existence, but this cannot suffice to establish jurisdiction to tax intangibles of a corporation which has acquired a commercial domicile elsewhere. It is reasonable to conclude

therefore that for purposes of intangible property taxation jurisdiction cannot be accorded to New Jersey upon the basis of corporate creation alone.

Giving due consideration to the economic facts of corporate existence in present day society, it is submitted that the appellant's taxable domicile is in New York and that jurisdiction to tax its intangible property cannot be imputed to New Jersey by the fiction *mobilis sequuntur personam*.

This conclusion is supported by a number of recent decisions. In *Wheeling Steel Corporation v. Fox*, 298 U. S. 193 (1936), *supra*, p. 25, Mr. Chief Justice Hughes writing for a unanimous court held (page 211):

"The Corporation complied with the laws of the State of its creation in designating its 'principal' office in that State. It is manifest that this designation, while presumably sufficient for the purpose, was a technical one and that the office is not a principal office so far as the actual conduct of business is concerned. While a duplicate stock ledger and records of transactions with respect to capital stock are maintained in Delaware, the business operations of the Corporation are conducted outside that State. The office in Delaware is maintained through the service of an agency organized to furnish this convenience to corporations of that description. To attribute to Delaware, merely as the chartering State, the credits arising in the course of the business established in another State, and to deny to the latter the power to tax such credits upon the ground that it violates due process to treat the credits as within its jurisdiction, is to make a legal fiction dominate realities in a fashion quite as extreme as that which would attribute to the chartering State

all the tangible possessions of the Corporation without regard to their actual location."

"The Corporation established in West Virginia what has aptly been termed a 'commercial domicile.'"

Again in *First Bank Stock Corporation v. Minnesota*, 301 U. S. 234 (1937), *supra*, p. 27, Mr. Justice Stone delivering the opinion of a unanimous Court said (page 237):

"Appellant is to be regarded as legally domiciled in Delaware, the place of its organization, and as taxable there upon its intangibles, see *Cream of Wheat Co. v. Grand Forks*, 253 U. S. 325, 328; *Johnson Oil Refining Co. v. Oklahoma*, 290 U. S. 158, 161; *Virginia v. Imperial Coal Sales Co.*, 293 U. S. 15, 19, at least in the absence of activities identifying them with some other place as their 'business situs.'* But it is plain that the business which appellant carries on in Minnesota, or directs from its offices maintained there, is sufficiently identified with Minnesota to establish a 'commercial domicile' there, and to give a business situs there, for purposes of taxation, to intangibles which are used in the business or are incidental to it, and have thus 'become integral parts of some local business.' *Wheeling Steel Corp. v. Fox*, 298 U. S. 193, 210; see *Farmers Loan & Trust Co. v. Minnesota*, 280 U. S. 204, 213; *Beidler v. South Carolina Tax Comm'n*, 282 U. S. 1, 8; *First National Bank v. Maine*, 284 U. S. 312, 331."

The principle here contended for was recognized and approved in *In re United Carbon Co. Assessment*, 118 W. Va. 348 (1937), where the Court held (page 357):

* Italics ours.

"In fact, it seems to us that the trend of the modern cases, although we confess that it has never been explicitly held, is to the effect that, for tax purposes, a corporation may acquire a domicile in a state other than the state of its incorporation. Where it clearly appears that a corporation has its main plant and principal offices for the transaction of business in a state where its executive officers perform their duties so that the practical corporate being centers its functions there, we see no reason for saying that it is to be presumed that the situs of its personal property is another state under the laws of which it holds its charter, where it does nothing more than maintain a technical principal office. It seems to us that this is the necessary import of the decision in the *Wheeling Steel Case*."

See also *Smith v. Ajax Pipe Line Co.*, 87 F. (2d) 567 (1937) *cert. denied*, 300 U. S. 677 (1937).

These decisions lead to the conclusion that for tax purposes a corporation may acquire a domicile in a state other than the state of its incorporation. This result would be, it is submitted, eminently reasonable and at the same time it would afford recognition to the fact that the only real domicile of a corporation is its commercial or business domicile. It has no domicile in the ordinary meaning of that word. A natural person may have, and frequently has, his domicile at a place other than the situs of his business. This is so because he normally has a private life entirely distinct from his business life. A corporate person, on the other hand, is incapable of engaging in any activity dissociated from the business for which it is incorporated. It has no dual existence. It functions only in a business or commercial capacity. It follows therefore that the only real domicile of a corporation is its commercial domicile.

It is not disputed that appellant's commercial domicile is in New York. For the reasons just mentioned, it is submitted that for purposes of property taxation its only real domicile is located there. Since appellant no longer has a domicile in the State of New Jersey in any real sense of the term, there are no reasonable grounds for permitting New Jersey to impose a tax on the basis of *mobilia sequuntur personam*. In fact if the maxim is to be applied at all, which is unnecessary in the present case since the intangibles have acquired a business situs in New York where they may be taxed, it should be applied realistically to New York where appellant has its taxable domicile.

For the reasons urged herein, it is submitted that the judgment of the Court of Errors and Appeals of New Jersey in sustaining the tax upon appellant's intangible property should be reversed.

C.

The Fact That the State of New York Has Not Exercised Its Jurisdiction to Tax Does Not Confer on New Jersey Jurisdiction to Tax.

The respondent and the courts below have attached significance to the fact that the appellant pays no property taxes in New York, although it is not disputed that the appellant pays premium taxes in New York, and may under the Federal Constitution be subjected to personal property taxes in New York.

It is submitted that this view is mistaken and entirely misconceives appellant's argument. Appellant does not contend that New Jersey is without jurisdiction to tax because double taxation exists, although it is true that a holding that New Jersey has jurisdiction to tax will permit

double taxation. The appellant's contention is that since its commercial domicile and the business situs of the property here taxed are entirely in New York the maxim *mobilia sequuntur personam* is not applicable and therefore New Jersey has no jurisdiction to tax.

The respondent's view is erroneous in that it sets up double taxation as a principle of jurisdiction, whereas in fact double taxation has merely been an evil which has clarified and developed the law of jurisdiction to tax.

This has also been the case with reference to tangible property where for a time some courts placed great emphasis upon the presence of the *possibility* of double taxation. Surely there can be no doubt that today tangible property, which has acquired a business situs in a state other than that of the domicile of the owner, is taxable only at such situs. No one would contend that if the situs failed to exercise its jurisdiction, that thereby jurisdiction and a constitutional basis to tax was conferred upon the state of the domicile.

The fact that there is double taxation, or the fact that the property here involved will not be taxed in New York, constitutes no basis to confer upon New Jersey jurisdiction to tax. Either New Jersey has jurisdiction upon reasonable grounds, or it has not.

This principle is stated precisely in *Commonwealth v. West India Oil Refining Co.*, 138 Ky. 828 (1910), *supra*, p. 31, where the Court held (page 834):

"The question in this case is not therefore whether the property in question has been taxed in Cuba or Porto Rico. The question is simply, Is it taxable here? If it has not been taxed there, it may

still be taxed there. *If not, that fact will not confer jurisdiction to tax it here.*"*

In *Miami Coal Co. v. Fox*, 203 Ind. 99 (1931), *supra*, p. 29, the Court, in concluding that the state of the domicile had no jurisdiction to tax intangibles which had acquired a situs outside of the state, held (page 115):

"And it does not matter to reach such a conclusion whether such property was taxed in such foreign jurisdiction or not, or even whether it was subject to taxation."

Likewise in *Commonwealth v. Appalachian Electric Power Co.*, 159 Va. 462 (1932) *cert. denied* 288 U. S. 613 (1933), *supra*, p. 34, the Court held (page 471):

"The fact that the State of New York imposes no such tax on this class of property is immaterial. The controlling question is, has that State the right to tax the property? We think it has. If so, Virginia under the decisions, has no such right."

The decisions of this Court likewise indicate that merely because property may escape from taxation elsewhere does not confer jurisdiction upon another state. *Buck v. Beach*, 206 U. S. 392 at 400 (1907); *Baldwin v. Missouri*, 281 U. S. 586 at 593 (1930):

The true issue here presented is whether there are reasonable grounds to support the jurisdiction of New Jersey to tax the intangible property of a domestic corporation, where such corporation has acquired a commercial domicile in New York where its intangible property has also acquired a business situs. Upon this issue it is submitted

* Italics ours.

that whether New York has exercised its admitted jurisdiction to tax or not is entirely immaterial.

It is respectfully submitted that for the reasons urged herein the judgment of the New Jersey Court of Errors and Appeals should be reversed.

Respectfully submitted,

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Newark, New Jersey. January 31, 1939.

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Supreme Court of the United States

OCTOBER TERM, 1938.

No. 449.

NEWARK FIRE INSURANCE COMPANY,
Appellant,

vs.

STATE BOARD OF TAX APPEALS and THE CITY
OF NEWARK,
Appellees.

REPLY BRIEF OF APPELLANT.

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Newark, N. J.

April 12, 1939.

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Reply to Point I.

Appellee's contention under Point I that the taxation of intangibles by the state of the domicile of the owner is an inherently just exercise of the taxing power is rested upon the proposition that the state of the domicile confers economic advantages upon the taxpayer which bear a direct relation to the imposition of the tax burden (Appellee's Br. 15, 16, 24, 25). The premise underlying this proposition is simply that the state which predominantly confers

economic benefits upon the taxpayer with respect to his intangible property has the jurisdiction to tax.

Appellee's recognition of the soundness of this basic proposition serves to clarify the issue presented here, because it is the application of this proposition to the facts in our case that establishes jurisdiction to tax in the State of New York which predominantly confers the many benefits and advantages upon the appellant which were formerly conferred by New Jersey. By reason of the fact that appellant's commercial domicile and the business situs of the intangible personal property taxed is in New York, New Jersey no longer confers the benefits ordinarily conferred by the state of the domicile upon intangibles. Certainly, it cannot be disputed that the mere fact that New Jersey has given appellant corporate existence confers no greater benefits upon appellant with respect to its intangible property, which has acquired a business situs elsewhere, than those conferred with respect to its real property and tangible personal property situated outside the state. New Jersey has no jurisdiction to tax such real and tangible property and no good reason is apparent, and none is suggested by appellee, why it should have jurisdiction to tax intangibles in such circumstances.

The foregoing illustrates that jurisdiction to tax intangibles must be compounded from more substantial stuff than the mere fact of creating corporate existence. The necessary ingredients are economic advantages, and benefits conferred with relation to the property taxed, and these are supplied in our case by the State of New York. New York, it is therefore submitted, is the only state that has jurisdiction to tax. This is so because it is the only state which confers those benefits which support the exercise of

the taxing power. That is what is meant in the Court's opinion in *First Bank Stock Corporation v. Minnesota* quoted on page 24 of appellee's brief. The considerations referred to by the Court, set forth in italics by appellee (p. 24), support the taxation of intangibles by the state of domicile, but the Court was careful to qualify this general statement by saying: "*at least where they are not shown to have acquired a business situs elsewhere.*"

Although appellee places great reliance on the inheritance tax cases, which give the state of the domicile exclusive jurisdiction to tax intangibles, it fails to point out the significant fact that in none of these cases was it shown that the intangibles had a business situs or had become identified with a commercial domicile different from that of the personal domicile of the decedent, and the Court in each case was careful to point out that it was not deciding that question. See *Farmers Loan & Trust Company v. Minnesota*, 280 U. S. 204, at 213 (1930); *First Bank Stock Corporation v. Minnesota*, 301 U. S. 234 at 241 (1937); *Texas v. Florida* (not yet officially reported; 83 L. ed. Adv. Ops. 549 (1939)).

The inheritance tax cases do not impugn the principle contended for by appellant. They serve only to illustrate what appellant concedes, that where it is not demonstrated that an intangible has acquired a business situs or has not become intimately connected with a commercial domicile distinct from the owner's personal domicile, the state of the domicile has jurisdiction to tax by virtue of the fiction *mobilia sequuntur personam*. In this connection in considering the inheritance tax cases, it is important again to note that as to tangible property, which affords a true analogy to ownership of intangibles, the cases now uni-

formly hold that only the state of the situs can impose transfer inheritance taxes. *Frick v. Pennsylvania*, 268 U. S. 473 (1925).

Appellee asserts that appellant corporation is within the "jurisdiction" of the state of its incorporation in the sense of "inherent power" to tax intangibles (Br. 24). To refute this argument, it need only be noted that this is equally true of a corporation owning real and tangible property outside of the state. It could not be contended that inherent power over such a corporation gives the right to tax such property. The fallacy in appellee's entire argument springs from confusing conflict of laws jurisdiction to tax with actual constitutional jurisdiction to tax. A sovereign power, having an individual within its territorial limits, might exact taxes from him on land he owns which is located in another state. Having physical control of his person the sovereignty would there have "inherent power" over the person to impose a tax. The Constitution, however, imposes limitations upon the state's power to tax which it would otherwise have within the principles of conflict of laws jurisdiction (see 1 *Beale, Conflict of Laws* (1935), p. 518), and a state may not rely merely upon its "inherent power" over the person to sustain the exercise of the taxing power.

The City also contends that this inherent jurisdiction is not destroyed by virtue of the fact that the owner voluntarily submits himself to taxation elsewhere (Br. 25). Passing aside the fact already pointed out that "inherent power" is not constitutional jurisdiction to tax, it is a sufficient answer to this argument to direct attention to the numerous cases where persons by moving their tangible property, or by changing their domicile, relieve themselves

of taxation in one state and voluntarily subject themselves to taxation in another.

The principle that an owner of property may voluntarily remove from one state and subject his property to the jurisdiction of another state finds approval in the decision of this Court in *Southern Pacific Co. v. Commonwealth of Kentucky*, 227 U. S. 63 (1911), where the Court said (p. 37):

“Since, therefore, an artificial situs for purposes of taxation is not acquired by enrollment nor by the marking of a name upon the stern, the taxable situs must be that of the domicile of the owner, since that is the situs assigned to tangibles where an actual situs has not been acquired elsewhere. The ancient maxim which assigns to tangibles, as well as intangibles, the situs of the owner for purposes of taxation has its foundation in the protection which the owner receives from the government of his residence, and the exception of the principle is based upon the theory that if the owner, by his own act, gives to such property a permanent location elsewhere, the situs of the domicile must yield to the actual situs and resultant dominion of another government.”

The claim is also made by the City that no constitutional limitation may be imposed upon the taxing power of the state of the owner's domicile, except upon the principle of providing relief against a present double taxation (Br. 25). This argument begs the entire question for the basic principle here, as has been demonstrated in appellant's main brief (pp. 43-45), is one of jurisdiction to tax and not double taxation. Furthermore, this argument rests upon a palpable misconception of the basis of the fiction *mobilia sequuntur personam* and the doctrine of business situs and

calmly ignores the basic principle that jurisdiction to tax is based upon benefits conferred, which appellee recognizes elsewhere in its brief (pp. 15, 16, 24, 25).

The maxim *mobilia sequuntur personam*, recognizes that personal property, both tangible and intangible, is given protection and derives benefits within the jurisdiction of some sovereign state, upon which that sovereign can impose taxes. It presumes that this protection and these benefits are afforded by the state of the domicile of the owner in the absence of proof that the property sought to be taxed is permanently located in another jurisdiction. This presumption is based upon the underlying assumption that ordinarily an owner uses and employs his property in the state in which he resides. But when it is demonstrated that tangible personal property is located permanently in a jurisdiction other than the owner's domicile, it is uniformly held that it is no longer taxable by the state of the domicile. The reason for this is simply that it can no longer be presumed to be in a jurisdiction other than where it is conclusively established to be.

The doctrine of business situs merely recognizes what has for many years been recognized with respect to tangible personal property, that an owner may so use and employ his intangible personal property in a jurisdiction other than that in which he resides, that it there obtains the economic advantages realized through the protection and enjoyment of the rights of ownership; that it there becomes integrated in the body of the wealth of the state; that, in a word, it there acquires a "situs" for purposes of taxation under the basic principle already referred to under this point that the jurisdiction to tax rests upon benefits conferred.

Where such a state of facts is shown to exist, as it has been shown in this case, the assumptions supporting the fiction *mobilia sequuntur personam* fall; and with them, it is submitted, falls the fiction.

There is nothing new, unusual or illogical in the conception of business situs for intangible property, as has been demonstrated in the cases set forth at length in our main brief (pp. 15-39). Throughout appellee's entire brief and more particularly under this point, however, the assertion is made that the fiction of *mobilia sequuntur personam* is a well tested doctrine that should not be abandoned in favor of "the comparatively untried fiction of business situs". If appellee means to suggest that the doctrine of "business situs" confers an actual physical situs upon intangibles, we must admit that we would be dealing with a fiction, but appellant has demonstrated here and in its main brief that the term is used to describe not a physical situs but a very real state of facts which will, when present, establish jurisdiction to tax intangibles. In this, its true and proper sense, there is nothing fictitious or unreal in the doctrine. It is a very real thing. Considering the long and steady development of the law of business situs, and the equally long and steady modification and rejection of the fiction of *mobilia sequuntur personam*, it is strange indeed that appellee should purport to be surprised by appellant's suggestion that the fiction should here yield to the realities of "business situs".

The only proper inquiry is whether or not New Jersey any longer has any reasonable basis for jurisdiction to tax. The reasonableness of that basis is not changed by reason of the fact that New York does not tax the property. The law with respect to the taxation of real and tangible prop-

erty once again affords ready analogy. New Jersey could not tax real estate or tangibles located in New York and owned by a New Jersey corporation merely because New York does not see fit to tax them. "

Reply to Point II.

Here again appellee stresses the fact that the inheritance tax cases hold that only the state of the domicile may tax intangibles. Only two observations need to be added to what already has been said under Point I herein. Firstly, it is interesting to note that appellee here admits that the inheritance tax cases indicate that intangibles are entitled to the same immunity from double taxation that is afforded to tangibles (p. 26). Secondly, those inheritance tax cases dealing with real property and tangible property hold that only the state of the situs may tax, and indicate that in fixing an exclusive jurisdiction to tax intangibles which have acquired a business situs elsewhere the Court will hold that it is in the state of the business situs.

Reply to Point III.

Under this point appellee places great reliance upon the decision of this court in *Schuylkill Trust Company v. Pennsylvania*, 303 U. S. 506 (1938). In this case it was held that the State of Pennsylvania could levy a property tax upon the owner of stock issued by a Pennsylvania trust company, doing business in that state, even though the owner was not resident in the state. Jurisdiction to tax was upheld on the theory that Pennsylvania, as the domicile of the issuing corporation, preserved and protected the property of the corporation, permitted it to carry on its

corporate functions there, and therefore gave value to the stock. On the issue presented here, the Court's only remark was:

"The property right so represented is of value, arises where the corporation has its home, and is therefore within the jurisdiction of that state; and *this, notwithstanding the ownership of the stock may also be a taxable subject in another state.*" (Italics ours.)

This language does not give *carte blanche* to other states to impose taxes on the ownership of this type of property. At most, it does not deny that the ownership of the stock in question "may" be taxable in another state. The ownership "may" be taxable in another state, it is submitted, only if the owner is substantially benefited under the laws of that state.

In considering this case it is necessary to keep in mind certain fundamental differences between tangible property and intangible property, although both are taxed under statutes taxing the "property" as such.

In the case of tangibles, since they have physical qualities, there is no difficulty in determining where the property is. By its very nature, a tangible can be in but one place and at that place—its actual situs—the rights of ownership are exercised and value is given to the tangible, through its use, protection and preservation.

Intangible property, however, unlike tangible property, is not a thing which may be seen or touched. It is a chose in action and has no physical qualities, therefore it can have no actual situs, and, unlike tangible property, we may not say that, as property, it is in one place, and one place

only. *New York ex rel. Whitney v. Graves*, 299 U. S. 366 at 372 (1937).

Basically, and in reality, an intangible is a thing of two parts, since it is a relation between two persons, and it may be said that it is in two places.

First, one part, which may be termed the "ownership part", is the part which the owner uses and enjoys in a manner similar to tangible property. A share of stock is "property" to its owner because he uses it in his business, and it there adds to his wealth, produces income, is sold, pledged, or transferred by him as a thing of value. Next, the second part, which may be termed the "value part", is that which actually gives value to the intangible. In the case of stock, it derives its value from the fact that the issuing corporation is permitted to own property and carry on business. The property tax in the *Schuylkill* case was sustained on this ground—that the taxing jurisdiction benefited and preserved the "value part" of the stock.

However, only the ownership part of intangibles is involved in the instant case. Taxes levied by the state of domicile of the owner of an intangible and by the state of the "business situs" of an intangible are based upon the same basic theory that the ownership part of the intangible is protected and benefited. Jurisdiction is claimed because the owner is permitted to enjoy and use the intangible and not because the underlying value of the intangible is protected.

It is with reference to the ownership part of intangibles, with the conflicting claims of the state of domicile and the state of business situs, that we find a complete analogy to the taxation of tangibles, with the conflicting claims of the state of domicile of the owner and the state of actual situs.

Just as the owner of a tangible can use it only where it is situated, so the owner of an intangible can use and enjoy it only in one jurisdiction and can only obtain the protection and derive economic advantages from one jurisdiction at one time. If an intangible is so used that it acquires a business situs apart from the domicile of its owner, it is in a real sense enjoyed, protected and "situated" only there, just as a tangible which has acquired a situs apart from the domicile of its owner is used, protected and situated only there. In such a case it is as unreasonable to permit the domicile of the owner of the intangible to tax as it is to permit the domicile of the owner of the tangible to tax.

Looking at intangibles in this light, and it is submitted that for purposes of taxation it is the only proper light in which to view them, there is nothing in the decision in the *Schuylkill* case which in any way conflicts with the principle contended for by appellant here. The fact that both the value part and the ownership part give reasonable bases for a property tax does not support the conclusion that the ownership part may be taxed twice by different jurisdictions. The ownership part of an intangible can be subject to the tax jurisdiction of only one state at any one time. In the normal case that jurisdiction is the domicile of the owner since the ownership part is "situated" and used there. Where, as here, it has acquired a "business situs", it is "situated" and used apart from the domicile of the owner. In such a case the application of the fiction *mobilia sequuntur personam* must yield to reality, in the same manner that the fiction yields to reality when a tangible has acquired a permanent situs away from the owner's domicile. It is unreasonable to hold that the "property"

is "situated" at the domicile of the owner when all the rights of ownership are enjoyed and protected elsewhere.

While the decisions of this Court do not in terms define an intangible in the manner just suggested, it is submitted that this conception of an intangible is sound and affords the true basis of the decisions of this Court in the *Schuykill* case and *First Bank Stock Corporation v. State of Minnesota*, 301 U. S. 234, and *Wheeling Steel Corporation v. Fox*, 298 U. S. 193.

Under this conception of an intangible it is apparent that only one state can confer those advantages upon the ownership part necessary to support jurisdiction to tax and the fact that some other state may confer similar benefits upon the value part of an intangible is wholly beside the issue presented here. For the reasons mentioned, it is submitted that New Jersey has no jurisdiction to tax and that jurisdiction rests exclusively in the State of New York.

Reply to Point IV.

Under Point IV an effort is made to make this Court believe that appellant is attempting to distort the principle of business situs to escape taxation completely..

No basis exists for this assertion. Appellant pays taxes in the State of New York, (R. 20) and it is clearly subject to the taxing power of that state. Merely because New York, in exchange for the many benefits it bestows upon appellant, does not exercise its admitted right to tax the appellant's intangible property cannot affect the result here. New York is obviously satisfied that appellant is bearing its just share of the cost of running the government of that state. The fact that New York imposes less taxes than

some other state that conferred equal benefits might impose cannot give New Jersey jurisdiction to tax. The public policy of New York may be such that it feels that appellant's presence there and the employment of its intangibles there gives New York benefits in such a variety of ways that it has no occasion to impose a property tax on its intangibles. One may not agree with such a policy, one may feel that such a policy is unsound, but no one can deny the right of the sovereign state of New York to adopt such a policy, and we think it can be safely assumed that New York would not pursue that policy unless it was economically beneficial for it to do so. At any event it is no concern of New Jersey and affords no basis for assumption of jurisdiction by New Jersey.

The reasonableness of the doctrine that the state of the commercial domicile of a corporation or the state of the business situs of a corporation's intangibles has jurisdiction to tax such intangibles is self-evident. It merely recognizes that it is in that state that the corporation and its property there employed secures the protection and obtains the benefits which were formerly obtained at the technical domicile.

Furthermore, appellant is not immune from taxation in New Jersey. New Jersey may, if it so chooses, impose a franchise tax upon appellant. In the light of these considerations it is submitted that appellee's argument cannot be considered seriously.

Reply to Point V.

Under Point V it is contended that intangibles acquire a business situs for taxation only when (1) they are essential and integral parts of a business conducted in the foreign

state, (2) they are definitely subjected to taxation by the laws of a foreign state, and (3) they have been correctly determined by the authorities of the foreign state to have a "business situs" within such state. (pp. 35-37)

How the authorities in the foreign state can "correctly determine" that a corporation has a "business situs", when a prerequisite of a business situs includes the fact of such determination, presents an interesting problem for speculation. The appellee is frankly unable to solve this problem. It is a sufficient answer to this argument to say that the suggested definition of "business situs" finds no support in reason or authority.

Whether or not a "business situs" exists is a question of fact. Where is the main office of the company located? Where are its general corporate books kept? Where are its executive officers located? Where are its general accounts kept? Where are its cash and securities kept? Where are the general affairs of the company conducted? In the case of an insurance company, where are its general accounting and underwriting offices located? The answers to these questions determine the existence of a business situs. In our case the answer to all these questions is indisputably the State of New York. These facts are in the record in this case (R. 14-16). They are the facts upon which the finding of the State Court is predicated. They are the reasons why the State Court said:

"This question must, in light of the proofs, be considered upon the inescapable premise that prosecutor had its business *situs* as of October 1st, 1934, and still has it, in New York; that the securities, the personalty involved, have become an integral part of its business *situs* in New York; but that pros-

ecutor pays no personal property tax to the State of New York" (R., p. 19).

The facts disclosed by the record are more than sufficient to support the State Court's finding that the business situs of the intangibles here taxed was in New York and not in New Jersey. They demonstrate that the intangibles of appellant have become identified with the conduct of appellant's business in the State of New York and have there become localized, and that the intangible wealth of appellant has become integrated in the body of the wealth of the State of New York.

It seems strange that appellee should now for the first time question the fact that the appellant's commercial domicile and business situs is located in New York, when it never questioned it in the courts below. It is no answer to say, as appellee does (Br., pp. 3, 4), that the findings of fact of the State Court, lightly referred to by appellee as a "premise", could hardly be challenged on appeal. Certainly, the "premise" could not be challenged on appeal because the "premise" was an inescapable conclusion from the proof in the case which appellee by stipulation agreed to. No one can be so naive as to suppose that appellee would have stipulated the facts without first having determined that they were in fact true.

In the light of the proofs in this case, it is submitted that it is "inescapable" that appellant's commercial domicile and the business situs of appellant's intangibles is in New York. The doubt as to this, which appellee now for the first time expresses, can hardly be considered real.

As has been pointed out in appellant's main brief, the facts in our case are closely analogous to the facts referred to by this Court in *Wheeling Steel Corporation v. Fox*, 298

U. S. 193, as being sufficient to establish business situs in West Virginia. The finding of the New Jersey courts that the business situs of the intangibles is in New York is clearly supported by the agreed facts in the case, and appellee's assertion (p. 35) that there is no adequate proof that they are essential and integral parts of the business conducted in New York is utterly without foundation.

Reply to Point VI.

Appellee's contention (p. 38) that "commercial domicile" is the same as "place of doing business" is likewise without support in reason or authority. The cases referred to in appellant's main brief demonstrate that "commercial domicile" is the place where a corporation predominantly exists and functions; where it predominantly carries on its business (main brief, pp. 39-43). In addition to the cases referred to therein, the following cases support appellant's contention.

In *State v. Tennessee Coal, Iron & I. Co.*, 188 Ala. 514 (Sup. Ct., 1914), the Court said (p. 521):

"* * * this corporation, in so far as its business in Alabama is concerned, has established a permanent habitation in this state and that it is now, by virtue of that habitation and the act which was placed upon our books for its special benefit, enjoying rights and privileges in this state which pertain to none of our private citizens, and which but few of our own domestic corporations can, under our general laws, enjoy. The above act, when read in connection with the complaint and the assessment, clearly shows that while, by virtue of its birth in the state of Tennessee, this corporation may owe allegiance to the state of Tennessee, it is in reality

a denizen of Alabama, and, in so far as the property which is involved in this assessment is concerned, must rely, and is, under our law, entitled to rely, for protection, upon the laws of this state. In modern times, particularly in our states, corporations are not unaccustomed to organize themselves under the laws of one state for the sole purpose of doing business in some other state. It not infrequently occurs that a company which is organized for the sole purpose of supplying some particular city with water or with electricity or with some other public necessity claims citizenship in some state distant from that in which it does its sole business simply because it organized itself into a corporation there. The actual business of such a corporation may be, and frequently is, confined exclusively to some locality in one state, while, pro forma, its citizenship is in some other state. In all such cases the law, when it comes to matters of taxation, must throw aside the draperies with which such a corporation is clothed, and ascertain the situs (the actual place) of its property, and then accord to the state, which in reality has the business of such a corporation within its care, that right of taxation which belongs to the state as a return for its actual protection.

. . .

It has, however, taken up a home with our people. It has established general offices in our state, and we think it plain from this record that, in so far as its business in Alabama is concerned, that business is as distinct from its business in Tennessee (if it has business in that state) as if it were in fact a corporation entirely distinct from the Tennessee corporation.

. . .

In our opinion the record in this case shows that the situs of the solvent credits made the subject of

this assessment is the state of Alabama, and that they are liable to an ad valorem tax in this state.

While the legal residence of appellee may be in Tennessee, it has actually domiciled itself with us, and, on the face of the papers in this record, read in connection with the above act under which the appellee has been conducting operations in this state, we are of the opinion that the situs of the property sought, in this proceeding to be taxed, is the state of Alabama, and that this state has the right to impose an ad valorem tax upon the same."

To the same effect is *Commonwealth, et al. v. United Cigarette Machinery Co.*, 119 Va. 447 (Sup. Ct. Appls., 1916), where the power of the State of Virginia to tax the intangible property of an English corporation was sustained. The decision in this case is based on the ground that the English corporation acquired a commercial domicile in Virginia, and so managed its property there that it was not subject to tax in respect thereto in England, its legal domicile.

The confusion which it is asserted might result from the adoption of the principle contended for by appellant is too readily assumed. There is no real basis for that assumption. There can be only one commercial domicile of a corporation and the suggested ten or fifteen commercial domiciles (p. 39) are based upon a misapprehension of the concept of commercial domicile. A corporation can have only one place where it predominantly exists and functions and where it predominantly conducts its general affairs. If it has fifteen offices carrying on various phases of its corporation functions, none of which really predominates, then

it has no commercial domicile but only its unchanged original domicile. Where it has no commercial domicile, the original domicile has jurisdiction to tax by virtue of the fiction *mobila sequuntur personam*. Nor is there any real difficulty in ascertaining where a corporation predominantly carries on its corporate affairs. This fact is no more difficult of determination than are many facts which the courts are daily finding.

Reply to Point VII.

While appellee asserts under Point VII that there is a serious conflict of authority among the state courts, the only authority it cites (pp. 41, 42) in conflict with the numerous ones referred to in appellant's brief is the decision of the Supreme Court of Michigan in *In re Truscon Steel Co.*, 246 Mich. 174. All that need be said about the decision of the Michigan court is to point out that it denies to the State of Michigan the power which this Court affirmed to West Virginia in *Wheeling Steel Corporation v. Fox*. If the Michigan courts refuse to permit the State of Michigan to impose a tax on the theory of business situs, there is nothing that can be done about it. Certainly, Michigan's refusal to recognize a power that this Court has recognized is no basis for asserting that appellant's intangibles are not within the taxing jurisdiction of the State of New York.

Under this point (p. 44 and elsewhere pp. 37 and 4) appellee places great reliance upon the claim that there is no possibility of double taxation in this case because the taxing statute under consideration here exempts personal property owned by a corporation of New Jersey "situate and being out of the state upon which taxes shall have been

actually assessed and paid within twelve months next before October 1st."

Upon this basis, it is argued that New Jersey has the constitutional power to tax property not elsewhere taxed. This argument is persuasive only if it is conceded that a state can acquire constitutional power to tax property by granting exemptions if it is elsewhere taxed. The fallacy of this argument is demonstrated by referring once again to tangible property. The statute does not give New Jersey the constitutional power to tax tangible property located in New York, and owned by a resident of New Jersey, upon which New York has not imposed a tax. The same considerations which deny to New Jersey the constitutional power to tax in the case of tangibles refuse a like power with respect to intangibles.

Furthermore, the statute does not have the effect claimed for it. Double taxation is possible under the statute. A case can readily be put where a resident of New Jersey would not or could not pay a tax imposed by the State of New York upon property located there by October 1, the taxing date in New Jersey. In that event New Jersey, under the foregoing statute, would have constitutional power to subject the property to a second tax here. It is hardly conceivable that one's constitutional rights can depend upon the uncertain fact of payment.

Reply to Point VIII.

The statute referred to under this point, which it is alleged appellant has violated, was first enacted in 1902 (P. L. 1902, p. 487). Appellant company was incorporated under a Special Act in 1811 and could not possibly have vio-

lated the provisions of the 1902 statute with respect to the contents of its corporate charter. The bald assertion that the appellant is subject to this provision of the later statute is unsupported by the citation of any authority. This lack of supporting authority is obviously due to the fact that the statute provides that the section in question applies only to persons forming corporations under its provisions.* It could not therefore apply to others.

Even if it be assumed that the provisions of the 1902 statute are applicable to appellant's charter, the practical construction placed upon the language referred to is to require companies formed thereunder to designate a "principal office" within the state and to permit the establishment of actual principal places of business elsewhere, where the general business of the company is conducted. This practice has existed for many years and the amendment to the statute (P. L. 1937, Ch. 164, p. 396) referred to on page 3 of appellee's brief, is merely a legislative recognition of the long established practice. This practical construction finds judicial support in this case. The contention made here was made by appellee in the New Jersey courts. The state courts apparently rejected the argument because no mention is made of it in the opinion of the Supreme Court, adopted by the Court of Errors and Appeals, and in the face of this contention the New Jersey courts found as a fact that the business situs of the appellant and the business situs of the property taxed was in the State of New York (R., p. 19).

If it be assumed further that there exists a violation of the statute in the respects claimed by appellee that fact could not affect the result here. The contention was rejected

* See 2 Comp. Stat. of New Jersey (1910), secs. 1, 3, p. 2839; amended, Laws of 1929, c. 6, p. 18.

in the state courts and the fact is, as was found in the state courts, that appellant has kept and maintained its principal office and place of business in New York for a period of five years before the present tax was imposed. The New Jersey courts did not hold that the alleged violation of this statute permits personal property taxes to be imposed as a penalty. This Court should not do so, for the reason that the penalty for such a violation is not the imposition of taxes upon property which is not within the jurisdiction of the state, but the revocation of the company's charter by appropriate action in the New Jersey courts.

It is respectfully submitted that the judgment of the Court of Errors and Appeals of New Jersey should be reversed.

Respectfully submitted,

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Attorney of Appellant.

On the brief:

G. DIXON SPEAKMAN,
WILLARD G. WOELPER.

Newark, New Jersey, April 12, 1939.

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Supreme Court of the United States

October Term, 1938

No. 456

**UNIVERSAL INSURANCE COMPANY AND
UNIVERSAL INDEMNITY INSURANCE COMPANY**
Appellants

against

**STATE BOARD OF TAX APPEALS OF THE STATE
OF NEW JERSEY and CITY OF NEWARK**
Respondents

REPLY BRIEF OF APPELLANTS

**JOHN G. JACKSON
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PAUL B. BARRINGER, JR.**
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STATE BOARD OF TAX APPEALS OF THE
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Respondents.

No. 456

REPLY BRIEF OF APPELLANTS

Appellees' Supplemental Statement of the Case

Before replying to the main argument in the appellees' brief, the appellants wish to make the following observations as to the appellees' supplemental statement of the case.

(1) In Paragraph 1 the appellees refer to a provision in the New Jersey Corporation Law (2 Compiled Statutes 2839, Amended Laws 1929, Chapter 6, p. 18) which they assert the appellants have violated by maintaining their main offices in the State of New York. The appellees contend that the appellants should not be permitted to relieve themselves of liability for taxation in New Jersey by violating their statutory obligations.

The appellants do not concede that in maintaining their principal offices in New York and conducting their business from such offices they have been guilty of any violation of the statute in question. The appellees do not cite any authority to sustain such contention. Whether the action of appellants constitutes a violation of the statute in question is purely a question of New Jersey law. All the facts in the present cases were before the New Jersey courts below and there is nothing in their opinions holding that the appellants were guilty of any violation of the statute.

Whether the appellants have violated this statute, moreover, has no bearing upon the question presented upon this appeal. This court has already held in the case of *Wheeling Steel Company v. Fox*, 298 U. S. 193, that a requirement in the law under which a corporation is organized that its "principal" office shall be in the state of incorporation does not prevent such corporation, when it in fact maintains in another state its main office from which its business is directed, from acquiring a "commercial domicile" in such other state so that its intangible property will acquire a business situs and be subject to taxation there. If the appellants have been guilty of a violation of the statute in question, the State of New Jersey, no doubt, has an adequate remedy by appropriate action, but this cannot confer upon the State of New Jersey jurisdiction to tax property which has a situs in New York State.

(2) Under Paragraph 3 the appellees refer to a provision in the Tax Laws (General Tax Law of 1918, Section 203 1-(c)), exempting from taxation property situated out of the State upon which taxes have actually been assessed

and paid. This section is clearly a saving clause and cannot enlarge the power of the State of New Jersey to tax property beyond its borders. It will be noted that this section makes no distinction between tangible and intangible property and if it has the effect which the appellees attribute to it would permit the State of New Jersey to tax tangible personal property situated in the State of New York if such property is not taxed by that State. We cannot believe that the appellees would make such a contention. It is the appellants' claim that the State of New Jersey has no greater rights to tax intangible personal property having a business situs in New York than it has to tax tangible personal property physically located in that State.

(3) Under Paragraph 4 the appellees seek to avoid the finding of the New Jersey Supreme Court that the intangible property of the appellants here sought to be taxed had a business situs in the State of New York. The appellees contend that a holding that intangibles have a business situs at a certain place is a conclusion of law and not a conclusion of fact. This the appellants emphatically deny. The subject will be discussed at a later point in this brief. The appellees further contend that the statement by the New Jersey Supreme Court that the intangible property in question had a business situs in New York is not a finding at all but a mere assumption made by the New Jersey court for the purpose of argument, leading to a decision which would have been the same if a contrary assumption had been made.

A reading of the decision of the New Jersey Supreme Court in the *Newark Fire Insurance* case, which is the basis of the decision in the instant cases, clearly demon-

strates that the statement in the opinion that the property taxed had a business situs in New York was not a mere assumption made "arguendo" but a definite finding of fact upon which the court based its decision. The question which was before the court for decision was the right of the State of New Jersey to tax intangible property which the appellants asserted had a business situs in another State. In passing upon this question it was necessary for the court first to pass upon the facts and determine the existence or non-existence of such business situs, and, secondly, to determine the legal effect of such business situs. The court first reviewed the facts relating to the situs of the property in question and then proceeding to a discussion of the legal questions involved said:

"As to the jurisdiction to tax prosecutor in this State. This question must *in the light of the proofs* be considered upon the inescapable premise that the prosecutor had its business situs as of October 1, 1934, and still has it in New York; that the securities and property involved have become an integral part of its business situs in New York" (*italics ours*).

It is difficult to see how the New Jersey Supreme Court could have used clearer language in stating the findings upon which its decision was based.

Appellees' Main Argument

The several points raised by the appellees in their main argument comprise an amplification and restatement of a single argument which is stated more clearly than elsewhere under Points IV and V of appellees' brief. This argument, briefly stated, runs as follows:

1. Based upon the jurisdiction over the person of a taxpayer and the application of the principle of *mobilia sequuntur personam*, the appellees attribute to the State of domicile a fundamental jurisdiction (variously described as an "inherent taxing power" (p. 32) or "underlying taxing power" (p. 37)) to tax a domestic corporation on its intangible property wherever situated. This power knows no territorial limits. It is indestructible and cannot be impaired or cut down and its exercise is only subject to certain equitable considerations more or less voluntarily applied by the taxing State to avoid the harshness of actual multiple taxation.

2. The appellees recognize the principle of business situs and concede that intangible property may acquire a situs in a State other than the State of domicile so as to subject it to taxation in such other State. They also recognize that the principle of business situs has raised new problems of multiple taxation which have not yet been solved (Point III, B. p. 10). From this we must assume that in spite of their insistence upon the authority of the case of *Cream of Wheat Co. v. County of Grand Forks*, 253 U. S. 325, appellees concede that this case has been qualified if not overruled by more recent decisions of this Court.

3. The appellees' solution of this problem is not clear. They insist that the "inherent" power of the State of domicile to tax all the intangibles of a domestic corporation exists along with the power of the State of business situs to tax upon that basis. Without expressly admitting it they seem to apply that this "inherent" power of the State of domicile is not to be exercised so as to tax intangible property which has acquired a business situs in an-

other State and has actually been taxed there. Whether this is supposed to be a voluntary act of self-restraint on the part of the State of domicile or is a limitation upon its "inherent" taxing power is not made clear.

4. The appellees contend that business situs is not a conclusion of fact but is a pure conclusion of law and results only when intangibles (1) are essential and integral parts of the business conducted in a foreign State; (2) are definitely subjected to taxation by the laws of the foreign State; and (3) have been determined by the authorities of the foreign State (legislative, executive and judicial) to have a business situs within such State (Point V, pp. 11, 35).

So runs the argument of the appellees. In reply the appellants respectfully submit that this whole argument is based upon a fiction, totally disregards the facts, and will result in utter confusion in the taxation of intangibles, which it has evidently been the intention of this Court by its recent decisions to clarify and reduce to principles which are capable of general application.

The so-called "inherent" or "underlying" taxing power of the State of domicile to which the appellees so frequently refer would seem to be based upon a combination of two things—(a) the power of the State of domicile over the person of the taxpayer and (b) the principle of *mobilia sequuntur personam*, which is exalted as a fundamental and undeviating principle of law.

The power of the State of domicile over the person of the taxpayer is admittedly far-reaching. It is so susceptible of abuse, however, that, as was said by this Court in

Union Transit Company v. Kentucky, 199 U. S. 194, at page 202: it "may partake rather of the nature of an extortion than a tax." It has been found necessary, therefore, to place territorial limits upon the exercise of this power. With respect to real estate this has always been true, and in spite of the doctrine of *mobilia sequuntur personam*, the increase in the amount and variety of personal property and the location of such property away from the domicile of the owner have made it necessary to place territorial limits upon the taxation of personal property if the taxation of such property is not to become sheer extortion. This Court in numerous decisions has recognized that where tangible personal property has a physical location in a State other than the State of domicile, so as to be within the taxing power of such other State, it is no longer subject to the taxing power of the State of domicile, *Union Transit Co. v. Kentucky*, 199 U. S. 194. The appellants contend that if the principal of business situs is to continue to be recognized by this Court, the same limitation must apply with respect to intangible property which has a business situs in another State.

The principle of *mobilia sequuntur personam* gives a color of territoriality to the exercise of the wholly arbitrary power of the State of domicile over a domestic corporation in the taxation of its intangible property. There is nothing "inherent" or "underlying" about this principle. It is based upon a pure legal fiction and is a mere rule of convenience growing out of the fact that such a rule in a simpler age tended *prima facie* to approximate a fair distribution of the burden of taxation in accordance with the value of the services rendered by the State in the

protection of the person and property of the citizen. This Court has repeatedly held, however, that it should not be applied where it does violence to the facts of the case, and it is upon the facts of each case that business situs rests. *Safe Deposit & Trust Company v. Virginia*, 280 U. S. 83; *Wheeling Steel Corp. v. Fox*, 298 U. S. 193; *First Bank Stock Corporation v. Minnesota*, 301 U. S. 235. The development of the doctrine of business situs has been due to a recognition by the courts of facts, as opposed to fiction.

It is natural that the appellees should contend that business situs is a legal conclusion or, rather, a legal result which can only be created by the courts of the foreign State in which such business situs is asserted to exist. This appellants emphatically deny and insist that the business situs of intangible property is a fact as much as is the physical location of tangible property. Admittedly intangible property has no location in space. As this Court said, however, in *New York ex rel. Whitney v. Graves*, 299 U. S. 366, it can acquire localization "by virtue of the attributes of the intangible right in relation to the conduct of affairs at a particular place." Such localization is based upon the facts surrounding the origin and use of the intangible in each case. Once these facts have been established, the localization of the intangible becomes as much a fact as the physical location of tangible property.

It is as much the duty of the State of domicile to recognize and give consideration to the facts establishing a business situs of intangibles in another State as it is the right of such other State to take such facts into consideration if it wishes to tax the property in question. To say that the courts of the State of domicile cannot recognize and give consideration to the existence of the business situs of intangible property in another State until

the taxing authorities of such other State have levied a tax on such property and the courts of such other States have passed upon its business situs, is as indefensible as to say that New Jersey has the right to tax tangible personal property, or even land admittedly in another State, until the taxing authorities of such other State have levied a tax upon such property and the courts of such other State have sustained such tax and have judicially established its physical location.

The argument of the appellees entirely disregards the principle of territorial limits upon the jurisdiction to tax. It ignores the principle of the localization of intangible property which is the basis of the whole conception of business situs.

The appellees seek to bolster their argument by citing decisions of certain States, such as Michigan, in which the principle of business situs is not recognized, either with respect to property of domestic corporations doing business elsewhere or with respect to property of foreign corporations doing business in that State. In answer to this, it is sufficient to say that if the State of Michigan does not choose to tax the property of foreign corporations situated within its borders which, under the decisions of the United States Supreme Court, is a proper subject of taxation there, this is a matter of domestic policy, but such self-restraint furnishes no justification whatever for the taxation by the State of Michigan of the property of its own citizens which has a location elsewhere. It might as well be argued that because the State of Michigan did not elect to tax the real estate or tangible property of citizens of a foreign State situated within its borders, it could tax such property of its own citizens situated beyond

its borders. Such a principle would permit each State to make its own rules for taxation in complete disregard of the Constitution of the United States.

The principles for which the appellees contend would result in utter confusion in the taxation of intangible property as the following illustrations will show: Two corporations A and B are organized under the laws of New Jersey which maintained only their registered "principal offices" in that State but transact no business there. Corporation A maintains its head office and does its business in a State such as West Virginia which, upon the principle of business situs, would tax all the intangible property of such corporation. The State of New Jersey, under the appellees' theory, would not tax the intangible property of such corporation. Corporation B, however, maintains its main office in Michigan, which does not tax intangible property of foreign corporations upon the principle of business situs. The State of New Jersey, upon the appellees' theory, would have the right to tax all the intangible property of this corporation.

The illustration could be expanded by assuming that these corporations from the main offices in question carry on business and permanently employ capital in various other States, some of which tax intangible property on the principle of business situs and others do not. Under the appellees' theory, the right of the State of New Jersey to tax the intangible property of each corporation employed in the several States of the union would depend upon the different policy of each such State with respect to its domestic taxation. The situation might be further complicated in the case of Corporation A, by the fact that the State of West Virginia, under the authority of *Wheeling Steel Corporation v. Fox, supra*, might also claim a

right to tax all the intangibles of Corporation A except those which are locally taxable. The inevitable confusion resulting from such a situation is clearly what this Court had in mind when in *Farmers Loan & Trust Co. v. Minnesota*, 280 U. S. 204 at p. 209, it said:

"The inevitable tendency of that view is to disturb the good relations among the states and produce the kind of discontent expected to subside after the establishment of the Union."

The judgment of the New Jersey Court of Errors and Appeals should be reversed.

Respectfully submitted,

JOHN G. JACKSON,

J. G. SHIPMAN,

PAUL B. BARRINGER, JR.,

Attorneys for Appellants.

New York, April 12, 1939.



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IN THE
Supreme Court of the United States

OCTOBER TERM, 1938

No. 449

No. 456

NEWARK FIRE INSURANCE COMPANY,
APPELLANT,

vs.

No. 449

STATE BOARD OF TAX APPEALS AND THE
CITY OF NEWARK, APPELLEES

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STATE BOARD OF TAX APPEALS OF THE
STATE OF NEW JERSEY AND THE CITY
OF NEWARK, APPELLEES

CONSOLIDATED BRIEF OF APPELLEES

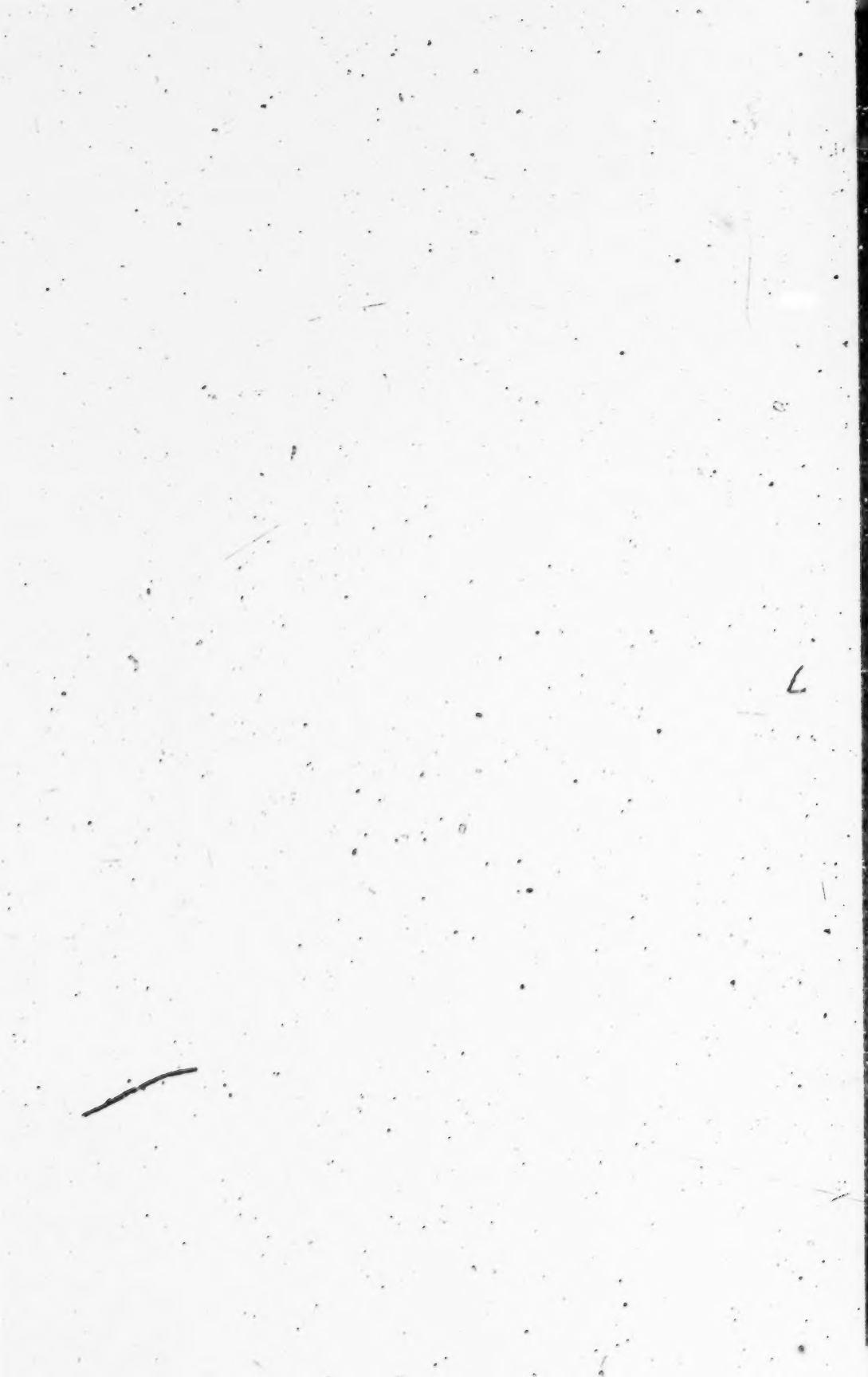
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CONSOLIDATED BRIEF OF APPELLEES

The same issues of law are decisive of these cases. The variations in the factual records are

¹ Italics in this brief are ours unless otherwise indicated.

not of such importance as to require separate briefing. The appellees (respondents below) are identical. Accordingly, counsel for appellees present a consolidated brief, using the factual record and arguments of counsel for the Newark Fire Insurance Company as the basis for appellees' argument, except where special reference is made to the Universal Insurance Company case.

In order to state appellees' position as to the jurisdiction of the Court it will be necessary first to correct certain inaccuracies and omissions in the Statement of the Case made in behalf of appellants.

SUPPLEMENTARY STATEMENT OF THE CASE

Under the contentions of appellants, great importance is given to factors which may determine (1) the "business situs" of their intangible property; (2) the "commercial domicile" of the corporate owner—as distinguished from the admitted "legal domicile" in New Jersey, the state of incorporation; and (3) a possible liability to "double taxation".

The following matters, omitted from appellants' Statement of the Case have, therefore, material significance.

1. The statute under which appellants¹ were incorporated (in New Jersey) required the corporate charter to state:

"The place where the *principal office* of said company is to be located *and its general*

¹The Newark Company was incorporated under Special Act in 1811; but the statute under which all the appellants do business provides that they shall have a principal office within the State from which their general business shall be conducted.

business conducted, which shall be within this State." 2 Compiled Statutes, 2839, Amended laws 1929, Chapter 6, p. 18.

In 1937 (long after the taxes here involved were imposed) the foregoing requirement was amended to read:

"The place where its principal office in this state is located." Laws of 1937, Chap. 164, p. 396.

Whether this amendment operates to relieve *previously* chartered corporations from a *future* obligation to maintain their principal office and the general conduct of their business in the State of New Jersey is not an issue in this case. There is, however, a legal issue presented here, which is: Can the appellant corporation, obligated by statute to maintain its principal office, and generally to conduct its business, in the state of incorporation (which would make it unquestionably subject to the taxes imposed), relieve itself of such taxation by violating its statutory obligations—and then using its own wrong as a defense against just taxation?

2. The Court's attention should also be directed to the fact that the taxes here questioned constitute the *only* taxes imposed by New Jersey on these New Jersey Corporations (except real estate taxes, the assessments for which are deducted from any assessment on capital stock and surplus). The statute specifically provides that, "no franchise tax shall be imposed upon any such fire insurance company or other stock insurance company included

in this section". Laws of 1918, Chap. 236, Sec. 307, p. 858. Rev. Statutes, Sec. 54:4-22.

3. It is mentioned by counsel for appellants that no personal property taxes are paid by these New Jersey corporations in New York; but counsel omit to call attention to the New Jersey statute which generously eliminates any possibility of "double taxation", by the following provision:

"The following property shall be exempt from taxation under this Act, namely:

(1) (c) The personal property owned by citizens or corporations of this State *situate and being out of the State upon which taxes shall have been actually assessed and paid within twelve months next before October first, being the day prescribed by law for commencing the assessment*". General Tax Laws of 1918, Sec. 203 (1) (c); Rev. Statutes 54:4-3.2.

4. This statute gives significance to the further inaccuracy found in appellants' Statement of the Case in asserting that the Supreme Court and the Court of Errors and Appeals of New Jersey had "found that appellants' commercial domicile and the business situs of its intangible personal property taxed by the City of Newark was located in New York". (Newark Brief, p. 5.)

The exact fact is that—the Supreme Court of New Jersey considered the issues on the basis of what it termed "an inescapable premise", i.e., that the intangibles taxed had a "business situs" in New York. But, since this "premise" did not prevent the court from upholding the taxing power of New

Jersey, this "premise" could hardly be challenged on appeal; and we submit—

First, that any holding that intangibles have a "business situs", at a certain place would be a conclusion of law, not a finding of fact; and

Second, that any holding by a New Jersey court that certain property had a situs in New York for purposes of taxation would not *create* or establish such a situs, because the New Jersey opinion would not be binding on the courts of New York. So we have here only an *assumption* as to legal status which was made by the New Jersey court in an opinion leading to a decision which would have been the same if the *contrary* assumption had been made.

There has been no judicial ruling which is legally effective to subject appellants' intangibles to taxation in New York. Accordingly—since New York admittedly does not assert any taxing power over such property—how can appellants support their statement that the property taxed in New Jersey is "subject" to taxation in New York?

With a more adequate statement of the factual record, the New Jersey statutes and the issues raised, a serious question may arise as to the jurisdiction of this Court to review the judgments of the highest court of New Jersey in these cases.

APPELLEES' POSITION AS TO JURISDICTION

It is fair to state that appellants urged in the New Jersey courts their contention that the taxes imposed would deprive them of property in violation of the Fourteenth Amendment. This contention may have been based in part upon the ground of possible double taxation. But this cannot be

regarded as a substantial contention—because under the facts appellants are not being taxed, and cannot be taxed, twice on the same property. Furthermore, it has not yet been held that “double taxation” is forbidden if it happens that two states have taxing power over the same subject. *First Bank Corporation v. Minnesota*, 301 U. S. 234; *Schuyllkill Trust Co. v. Pennsylvania*, 302 U. S. 506.

The present substantial contention appears to be based on a denial of any jurisdiction of New Jersey over the subject matter of this taxation—a claim that the tax is one imposed wholly without authority and hence a deprivation of property without due process of law. Against this contention we would point out that the general rule that intangibles are taxable at the legal domicile of the owner is so thoroughly established in the law that this normal taxing power of the state of domicile must be conceded and can not be seriously questioned—at least until there be established a clear and exclusive power of such taxation in another sovereignty.

There is no evidence in the record to show that New York has or claims any power to tax these corporations on their intangibles. On the contrary, it is conceded that these corporations pay no personal property tax in New York. (Newark Rec. p. 20; Universal Rec. p. 33.) These intangibles have not been given a “situs for taxation” in New York by virtue of any effort of that State to tax them, or any decision of a New York court that they are subject to taxation in New York. There is, therefore, no basis in the record for claiming that a clear and exclusive power of taxation has

been established in the State of New York that *might* exclude the State of New Jersey from the exercise of its normal power to tax intangibles at the legal domicile of their owner.

This Court may well decide that it has no jurisdiction to review the judgments of the highest court of New Jersey in these cases, because (1) the decision of the constitutional question now urged by appellants was not essential to the decision of the cases by the State court, and (2) there is no substantial federal question presented to this Court. Since, however, the argument against the jurisdiction of this Court must be practically the same as the argument in support of the New Jersey judgments, we will proceed now to a single argument in favor of the validity of the taxes imposed.

SUMMARY OF ARGUMENT

POINT I.

The common law rule and the prevailing rule today is that intangibles are taxable at the domicile of the owner, under the doctrine of *mobilia sequuntur personam*.

Cream of Wheat Company v. Grand Forks, 253 U. S. 325;

Blodgett v. Silberman, 277 U. S. 1;

Farmers Loan Company v. Minnesota, 280 U. S. 204;

First National Bank v. Maine, 284 U. S. 312;

First Bank Corporation v. Minnesota, 301 U. S. 234.

POINT II.

In accord with this general rule is the specific rule that the inheritance of intangibles is taxable at the domicile of the decedent owner.

Blodgett v. Silberman, *supra*.

Farmers Loan Company v. Minnesota, *supra*.

Baldwin v. Missouri, 281 U. S. 586;

Beidler v. South Carolina Tax Commission, 282 U. S. 1;

First National Bank v. Maine, *supra*.

These inheritance tax cases also lay down the rule that such taxes can be imposed *only* by the domiciliary state. But this rule seems to be based,

in part at least, upon the reasoning that such inheritance taxes are not property taxes but "an excise or privilege tax imposed on the transfer of an intangible".

By a divided court it has been held that such a transfer is taxable only in the one state where the event takes place.

The inheritance tax cases emphasize the tendency of recent decisions of this Court to confine the power to tax intangibles, so far as possible, to one state—the state of the owner's domicile.

POINT III.

The general rule that intangibles are taxable at the owner's domicile has been supplemented, and, to an uncertain extent modified, by the comparatively modern doctrine that some intangibles may be found to have a "business situs", and thereby become taxable, outside the state of the owner's domicile.

New Orleans v. Stemple, 175 U. S. 309;

Metropolitan Life Insurance Company v.

New Orleans, 205 U. S. 395;

Wheeling Steel Corporation v. Fox, 298 U. S. 193. ,

First Bank Corporation v. Minnesota,
supra.

(A) The doctrine—or fiction—of a "business situs" for intangibles developed out of consideration for the reasonable desire of a state to obtain revenues from any foreign corporation which was doing business within the state and enjoying the protection of its government.

(B) But the establishment of a "business situs" for the taxation of certain intangibles in a state other than that of the owner's legal domicile (wherein, according to general rule, all intangibles would be taxable) raised a new problem of possible multiple taxation, which has not yet been solved.

Farmers Loan Company v. Minnesota,
supra. Page 213.

First National Bank v. Maine, supra.
Page 381.

First Bank Corporation v. Minnesota,
supra. Pages 239, 240.

Schuykill Trust Company v. Pennsylvania, 302 U. S. 506, 516.

POINT IV.

In the present case the doctrine of a "business situs" for intangibles is invoked—not in support of any taxing power exercised by a foreign state, but to provide corporations with complete immunity from taxation of intangibles, by denying the taxing power of the only state exercising it—which is the state of incorporation and legal domicile.

The doctrine that intangibles may be given a "business situs" for taxation, which was designed to support a justifiable tax, cannot be used to support the evasion of all taxation of intangibles, for the following reasons:

First—the nature and reason for the doctrine is an equitable and fair distribution of the burdens of government.

Second—Just taxation is a practical problem; and a legal fiction developed in support of a justifi-

able taxing power will not be extended to provide an escape from an alternative and equally justifiable taxing power.

Third—the doctrine can and should be so interpreted and applied as to sustain appropriate taxation by any state wherein the owner of intangibles engages in business, without depriving the state wherein the owner has his legal domicile of its coincident or alternative power of taxation.

POINT V.

Counsel for appellees contend—

A—That intangibles are given a “business situs” for taxation in a foreign state only when—

- 1—They are essential and integral parts of business conducted in the foreign state, *and*
- 2—They are definitely subjected to taxation by the laws of the foreign state, *and*
- 3—They have been correctly determined by the authorities of the foreign state (legislative, executive and judicial) to have a business situs within such state.

B—That intangibles do *not* acquire a “business situs” for taxation through the mere deposit of documentary evidences within a foreign state or through any activities of their owner *not coupled with* the exercise of a justifiable taxing power by the foreign state.

C—That when a “business situs” for taxation is given to intangibles in a foreign state the normal, underlying taxing power of the state of the owner’s

domicile will be diminished, if at all, only to the extent necessary to avoid double taxation.

D—When the state of legal domicile provides an exemption for the owner of all properties (including intangibles) which are taxed on 'side the state, there is no sound basis for further curtailing the sovereign power of the domiciliary state to tax intangibles not elsewhere taxed.

POINT VI.

The establishment by a corporation of a "commercial domicile" outside the state of incorporation cannot by itself operate to take away the taxing power over intangibles otherwise possessed by the state of incorporation. The "business situs" of intangibles depends not on localization of management, but upon localization of the intangibles.

Wheeling Steel Corporation v. Fox, supra.
New York ex rel. Whitney v. Graves, 299
 U. S. 366.

POINT VII.

The decisions of state courts pertinent to the present issue show—

First—that there is a conflict of authority; although according to a recent review it appears that a numerical majority of the states support "taxation by the state of domicile even though credits are taxed in another state under the business situs theory".

(See Multiple Taxation by the States, 48
 Harvard Law Review, 407, 425.)

Second—that intangibles cannot be regarded as having a “business situs” for taxation until such taxation has been legislatively imposed, executively enforced and judicially approved. For example, the Michigan Supreme Court has repeatedly *declined* to approve taxation of intangibles owned by foreign corporations, on the “business situs” theory; and has consistently approved taxation of the intangibles owned by domestic corporations.

In re Truscon Steel Company, 246 Michigan, 174.

See also *Rounds & Porter Lumber Company v. Livesay*, 66 Fed. (2d) 298.

Third—that the most practical and desirable way to avoid multiple taxation, while at the same time sustaining unimpaired the sovereign power of each state to tax appropriately persons and corporations legally domiciled within the state, is that adopted by the State of New Jersey in providing a specific exemption from taxation of the personal property owned by citizens and corporations domiciled in the state which is actually taxed outside the state.

POINT VIII.

Appellants should not be permitted to take advantage of their own violation of statutory obligations as a means of evading taxation otherwise clearly within the power of the state of incorporation.

ARGUMENT

POINT I.

The argument of counsel for appellants is an effort to set aside the long established and fundamental rule for the taxation of intangibles at the domicile of the owner, on the ground that this rule is based on a fiction, *mobilia sequuntur personam*, which should be abandoned. With the abandonment of the old rule, counsel would give controlling force to a new rule based on another fiction—a rule that intangibles should be taxed only where they have a “business situs”. Not only is the fictitious character of this “business situs” blandly disregarded, but also the unhappy consequences—of wholesale tax evasion and new conflicts of taxing power—which would flow from abandoning the well tested fiction of *mobilia sequuntur personam* in favor of the comparatively untried fiction of “business situs”.

Real estate and tangible property being physical objects can have a physical situs. Therefore, a rule of law establishing a practically exclusive jurisdiction to tax tangible property at the place of its physical situs is both reasonable and generally enforceable; although difficulties do arise when tangible property is moved around and uncertainty is created as to its permanent situs. But when the taxing power is to be exerted over intangibles, it becomes more difficult to lay down a logical and enforceable rule.

“The rule that property is subject to tax at its situs, within the territorial jurisdiction of the taxing state, readily understood

and applied with respect to tangibles, is in itself meaningless when applied to intangibles which, since they are without physical characteristics, can have no location in space". *First Bank Corporation v. Minnesota*, 301 U. S. 234.

There are many obvious and persuasive reasons for taxing the owner of intangibles at his legal domicile, including the fact that intangibles can be more easily "located" there (that is, the existence and amount of intangibles can be more easily ascertained); and taxes can be more easily assessed and collected where there is jurisdiction over the person owning such property rights. Furthermore, there is justification for the exercise of taxing power because—

"The economic advantages realized through the protection, at the place of domicile, of the ownership of rights in intangibles, the value of which is made the measure of the tax, bear a direct relationship to the distribution of burdens which the tax effects."

First Bank Corporation v. Minnesota, supra.

Even tangible property may have an uncertain or evasive situs, as became apparent in the case entitled *Southern Pacific Company v. Kentucky*, 222 U. S. 63, where a sea going vessel, having no permanent situs at any port, was given a situs for taxation in the State of Kentucky, which is far from the sea, but which was the domicile of the owner corporation.

It needs no argument to demonstrate that credits and such intangibles as are represented by bonds

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and certificates of stock (which are frequently difficult to "locate", and the evidences of which may be easily, frequently and secretly moved from place to place) are likely to escape taxation altogether unless they are given their historical situs in accordance with the maxim *mobilia sequuntur personam*. Since it is one of the purposes and objects of judicial rules as to taxation to uphold the power of government to levy taxes on those capable of paying them, who should share the burdens of government in accordance with benefits received from the protections of government; and since it is one of the purposes and objects of judicial rules as to taxation *not* to encourage or to aid in the evasion of justifiable taxation, we submit that the Court cannot be expected lightly to abandon the useful fiction of *mobilia sequuntur personam* in favor of another fiction which would encourage and make easier the evasion of reasonable taxation.

There was no such purpose evident in the development of this newer fiction which ascribes a "business situs" to certain varieties of intangibles under certain limited conditions. But when counsel for appellants seek to establish an *exclusive* "jurisdiction" for the taxation of intangibles in a state where they are not actually taxed, in a state which has not even attempted to establish any taxing "jurisdiction" over them by any claim that such intangibles have a business situs therein, then counsel are seeking to debase the theory of "business situs" from a justification of desirable taxing power into a justification of undesirable tax evasion.

Thus we are compelled at the outset to insist that the common law rule is still the prevailing rule—that intangibles are taxable at the domicile of the owner, and that the doctrine of "business situs" is a supplement to, and not a substitution for, this prevailing rule; or, at the most, a modification, but not a destruction, of the normal power of taxation possessed by the state wherein the owner of intangibles is domiciled.

The principal case which squarely answers appellants' argument is *Cream of Wheat Company v. Grand Forks*, 253 U. S. 325, where this Court held that a corporation confessedly domiciled in ~~New Orleans~~ *NORTH DAKOTA*, incorporated under the laws of that state, was taxable there upon its intangible property, and "the fact that its property and business were entirely in another state did not make it any the less subject to taxation in the state of its domicile". The Court further held that the limitation imposed by the Fourteenth Amendment upon taxation by a state of a resident, "for property which has acquired a permanent situs beyond its boundaries", had no application to intangible property "even though the property is also taxable in another state by virtue of having acquired a 'business situs' there".

Since the foregoing case is squarely in point, counsel for appellants are forced to take the position that this case is no longer "controlling with reference to jurisdiction to tax intangibles which have acquired a business situs". (Newark Brief p. 28.) (To the same effect is the argument of counsel for the Universal Insurance Company summed up in their Brief at 18.)

We are, therefore, called upon to point out that in *Blodgett v. Silberman*, 277 U. S. 1, this Court definitely held as follows:

"At common law the maxim 'mobilia sequuntur personam' applied. There has been discussion and criticism of the application and enforcement of that maxim, but it is so fixed in the common law of this country and of England, in so far as it relates to intangible property, including choses in action, without regard to whether they are evidenced in writing or otherwise and whether the papers evidencing the same are found in the State of the domicile or elsewhere, and is so fully sustained by cases in this and other courts, that it must be treated as settled in this jurisdiction whether it approve itself to legal philosophic test or not.

"Further, this principle is not to be shaken by the inquiry into the question whether the transfer of such intangibles, like specialties, bonds or promissory notes, is subject to taxation in another jurisdiction. As to that we need not inquire. It is not the issue in this case. For present purposes it suffices that intangible personalty has such a situs at the domicile of its owner that its transfer on his death may be taxed there." * * *

In *Farmers Loan Co. v. Minnesota*, 280 U. S. 204, the Court strongly upheld the power of the creditor's domicile (New York) to tax the inheritance of Minnesota bonds and denied the power of the debtor's domicile to levy an inheritance tax

upon their transfer. The majority of the Court was plainly moved by the desire to establish principles that would prevent multiple taxation and held:

"Taxation is an intensely practical matter and laws in respect of it should be construed and applied with a view of avoiding, so far as possible, unjust and oppressive consequences. We have determined that in general intangibles may be properly taxed at the domicile of their owner and we can find no sufficient reason for saying that they are not entitled to enjoy an immunity against taxation at more than one place similar to that accorded to tangibles."

But, in this case the majority opinion expressly left open the question as to whether intangibles taxed at a "business situs" might also be taxed at the owner's domicile. Mr. Justice Stone, who concurred "in the result"; and Justices Holmes and Brandeis, who dissented, all expressed the opinion that there was no constitutional objection to taxation of a single economic interest by two states where "legal relationships with different taxing jurisdictions" justified taxation by both.

In *First National Bank v. Maine*, 284 U. S. 312, the Court again sustained inheritance taxation of intangibles (shares of stock) by the state of domicile of the decedent owner (Massachusetts) alone, on the ground that "the transmission from the dead to the living of a particular thing, whether corporeal or incorporeal, is an event which cannot

take place in two or more states at one and the same time"; and further held:

* * * "Practical considerations of wisdom, convenience and justice alike dictate the desirability of a uniform general rule confining the jurisdiction to impose death transfer taxes as to intangibles to the state of the domicile; and these considerations are greatly fortified by the fact that a large majority of the states have adopted that rule by their reciprocal inheritance tax statutes." * * *

Again the Court reserved the question as to resolving any conflict of jurisdiction between the state of domicile and another state where intangibles might be "so used . . . as to give them a situs analogous to the actual situs of tangible personal property". The dissenting opinion of Mr. Justice Stone (in which Justices Holmes and Brandeis concurred) upheld the power of Maine also to tax the transfer, on the ground that "the stockholder could secure complete protection and effect a complete transfer of his interest only by invoking the laws of *both* states". To this, it was stated, there was no constitutional objection; and it was pointed out that this would not result in actual "double taxation", because the Maine statute directed the Massachusetts tax to be deducted from the Maine tax.

In *First Bank Corp. v. Minnesota*, 301 U. S. 234, the Court sustained a property tax against the owner of shares of stock which were used by the owner, a Delaware corporation, in its business in

Minnesota. The opinion of the Court, by Mr. Justice Stone, significantly points out that

"Appellant's entire business in Minnesota is founded on ownership of the shares of stock and their use as instruments of corporate control."

Thus it is made plain that these shares of stock were taxable in Minnesota, not because the certificates were deposited there, or because the company had executive offices there, but because these shares of stock were *necessarily used* in the conduct of business in Minnesota so that, like local accounts receivable or other localized credits, they had properly been given a "business situs" for taxation, and had been taxed by the State of Minnesota.

In this same opinion are several rulings particularly pertinent to the present issue:

"Appellant is to be regarded as legally domiciled in Delaware, the place of its organization, and as taxable there upon its intangibles, see *Cream of Wheat Co. v. Grand Forks*, 253 U. S. 325, 328; *Johnson Oil Refining Co. v. Oklahoma*, 290 U. S. 158, 161; *Virginia v. Imperial Coal Sales Co.*, 293 U. S. 15, 19, at least in the absence of activities identifying them with some other place as their 'business situs.'"

Appellant in the above case argued that the shares of stock which it owned in Montana and North Dakota banking corporations were expressly made taxable in these respective states of their origin; and that "as due process forbids the imposition of a property tax upon intangibles in more than one state, they cannot be taxed in Minnesota".

The opinion replied:

"The logic is inexorable if the premises are accepted. But we do not find it necessary to decide whether taxation of the shares in Montana or North Dakota is foreclosed by sustaining the Minnesota tax. Nor need we inquire whether a non-resident shareholder, by acquiring stock in a local corporation, so far subjects his investment to the control and laws of the state which has created the corporation as to preclude any objection, on grounds of due process, to the taxation of the shares there, even though they are subject to taxation elsewhere, at their business situs. We leave those questions open. It is enough for present purposes that *this Court has often upheld and never denied the constitutional power to tax shares of stock at the place of the domicile of the owner.* *Hawley v. Malden*, 232 U. S. 1, 11, 12; *Klein v. Board of Tax Supervisors*, 282 U. S. 19, 24; *Wright v. Louisville & Nashville R. Co.*, 195 U. S. 219; *Kidd v. Alabama*, 188 U. S. 730; *Darnell v. Indiana*, 226 U. S. 390. And it has fully recognized that the business situs of an intangible affords an adequate basis for fixing a place of taxation. See *Wheeling Steel Corp. v. Fox*, *supra*; *De Ganay v. Lederer*, *supra*; cf. *Safe Deposit & Trust Co. v. Virginia*, 280 U. S. 83, 91."

Realizing that the Court is sufficiently familiar with its own opinions so that extended quotation is usually inadvisable, we take the liberty of quoting further from this recent opinion because it pro-

vides a much better expression than we could otherwise present of the apparent conflict of theories regarding equitable and valid taxation, which must be at least partially resolved in the decision of the present case—

“The rule that property is subject to taxation at its situs, within the territorial jurisdiction of the taxing state, readily understood and applied with respect to tangibles, is in itself meaningless when applied to intangibles which, since they are without physical characteristics, can have no location in space. See *Wheeling Steel Corp. v. Fox*, *supra*, 209. The resort to a fiction by the attribution of a tax situs to an intangible is only a means of symbolizing, without fully revealing, those considerations which are persuasive grounds for deciding that a particular place is appropriate for the imposition of the tax. *Mobilia sequuntur personam*, which has won unqualified acceptance when applied to the taxation of intangibles, *Blodgett v. Silberman*, 277 U. S. 1, 9-10, states a rule without disclosing the reasons for it. But we have recently had occasion to point out that enjoyment by the resident of a state of the protection of its laws is inseparable from responsibility for sharing the costs of its government, and that a tax measured by the value of rights protected is but an equitable method of distributing the burdens of government among those who are privileged to enjoy its benefits. See *New York ex rel. Cohn v. Graves*, 300 U. S. 308.

"The economic advantages realized through the protection, at the place of domicile, of the ownership of rights in intangibles, the value of which is made the measure of the tax, bear a direct relationship to the distribution of burdens which the tax effects. These considerations support the taxation of intangibles at the place of domicile, at least where they are not shown to have acquired a business situs elsewhere, as a proper exercise of the power of government. Like considerations support their taxation at their business situs, for it is there that the owner in every practical sense invokes and enjoys the protection of the laws, and in consequence realizes the economic advantages of his ownership. We cannot say that there is any want of due process in the taxation of the corporate shares in Minnesota, irrespective of the extent of the control over them which the due process clause may save to the states of incorporation."

We submit that out of the foregoing fair statement of conflicting theories of taxation and out of the prior opinions of the Court (from which we have made a few citations and will hereafter add others), there emerge certain well-grounded principles upon which a decision of present issues can be based.

First—The state of the owner's domicile has undoubted "jurisdiction" (in the sense of "inherent power") to tax intangibles. Here is found, at least physical power which can be exerted over physical

objects, i.e., individual persons or the officers of a corporate person.

Second—There is a sound basis for the exercise of the taxing power possessed by any sovereign state by taxing those legally domiciled within it upon their intangibles; because the life, liberty and property of all such persons is primarily protected by the domiciliary state; and, in the case of a corporation created by the state, its life and liberty and power of possessing property has been created by and is sustained by the state of its incorporation.

Third—The legal creation of a "business situs" for intangibles outside the state of the owner's legal domicile is a highly artificial creation, a legal fiction utilized for the purpose of sustaining the judicial opinion that a state wherein an owner of intangibles uses them in the conduct of his business is an appropriate place to levy a tax on the owner, based on the value of his intangibles so used and thereby "localized" within the state.

Fourth—The "jurisdiction", that is, the inherent power, of the state of the owner's domicile to tax him on the basis of the value of his intangibles, is not *destroyed* because the owner voluntarily submits himself to taxation *elsewhere* on some or all of his intangibles by engaging in business in another state and using these intangibles therein.

Fifth—If there be any constitutional limitation upon the taxing power of the state of the owner's domicile by reason of taxes levied against the owner elsewhere, that limitation must be found in the principle that the citizen should be relieved from double taxation where two states have taxing power over the same subject matter, and that, as a matter of equity, the *exercise* of power by one

may be held superior to and exclusive of the exercise of power by the other.

Sixth—Therefore, there is no logical justification for the "constitutional" objection presented by appellants in the present case, whereby they seek to deny the "jurisdiction" of New Jersey (that is, the inherent and constitutional taxing power of a sovereign state!) to tax its citizens upon intangibles, although they are not taxed upon such intangibles by any other state.

POINT II.

We have heretofore referred to some of the cases establishing the rule that inheritance of intangibles is taxable at the domicile of the decedent; and to the further rule, supported by a majority of the Court, that such taxes can be imposed *only* by the domiciliary state. In addition to the cases previously quoted, brief reference should be made to at least two others.

In *Baldwin v. Missouri*, 281 U. S. 586, inheritance taxes were imposed by Illinois upon intangibles owned by a decedent resident of Illinois and bequeathed to her son, also an Illinois resident. The State of Missouri sought to impose an inheritance tax on those intangibles which consisted of deposits in Missouri banks, and bonds and promissory notes, the documentary evidences of which were within the State of Missouri. Most of the notes were, in fact, executed by citizens of Missouri and secured by liens upon Missouri real estate.

A majority of the Court held against the taxing power of the State of Missouri, and observed:

"Ordinarily bank deposits are mere credits and for purposes of ad valorem taxation have situs at the domicile of the creditor only. The same general rule applies to negotiable bonds and notes, whether secured by liens on real estate or otherwise."

Thus, again the primary authority of the state of the owner's domicile was upheld. The dissenting minority of the Court did not question the taxing power of the domiciliary state, but maintained that there was no constitutional objection to taxation also by the State of Missouri.

In the dissenting opinion of Mr. Justice Holmes (in which Justices Stone and Brandeis concurred) the constitutional objection was dealt with as follows:

"And what are the grounds? Simply, so far as I can see, that it is disagreeable to a bondowner to be taxed in two places. Very probably it might be good policy to restrict taxation to a single place, and perhaps the technical conception of domicile may be the best determinant. But it seems to me that if that result is to be reached it should be reached through understanding among the States, by uniform legislation or otherwise, not by evoking a constitutional prohibition from the void of 'due process of law', when logic, tradition and authority have united to declare the right of the State to lay the now prohibited tax."

In the dissenting opinion of Mr. Justice Stone (in which Justices Holmes and Brandeis concurred) it was trenchantly observed that—

“Under the law, as it has been, no one need subject himself to double taxation by keeping his securities in a state different from his domicile, or by seeking the protection of its laws for his mortgage investments.”

We submit that the inheritance tax cases provide a clear demonstration that—

First—Authority and logic support the taxing power of the domiciliary state.

Second—If double taxation is to be avoided, the logical means would be to sustain an exclusive taxing power in the domiciliary state.

Third—If, through the theory of a “business situs” a taxing power is sustained in a second state, either double taxation cannot be avoided (perhaps, should not be avoided) or, at the most, the taxing power of the domiciliary state may be diminished; but its taxing power will not be wholly denied or destroyed because of the existence of a coincident or alternative taxing power in another state.

POINT III.

We have been discussing heretofore the doctrine that intangibles may be found to have a “business situs” and thereby become taxable outside the state of the owner’s domicile. It would be well to consider briefly the nature and reason for the “business situs” theory, so that it may not be expanded beyond all reason (as counsel for appel-

lants would have the theory expanded) and become destructive of the very purpose of equitable taxation which brought about the development of this theory.

We may well begin our consideration by quoting a definition of "business situs" from a recent opinion of this Court:

* * * "When we speak of a 'business situs' of intangible property in the taxing State we are indulging in a metaphor. We express the idea of localization by virtue of the attributes of the intangible right in relation to the conduct of affairs at a particular place. The right may grow out of the actual transactions of a localized business or the right may be identified with a particular place because the exercise of the right is fixed exclusively or dominantly at that place. In the latter case the localization for the purpose of transacting business may constitute a business situs quite as clearly as the conduct of the business itself." *N. Y. ex rel. Whitney v. Graves*, 299 U. S. 366.

In the light of the foregoing definition, we can understand the reason for giving a "business situs" to accounts receivable and notes collectible within a particular state, as such intangibles were given a "business situs" in *New Orleans v. Stemple*, 175 U. S. 309; *Metropolitan Life Insurance Company v. New Orleans*, 205 U. S. 395; *Wheeling Steel Corporation v. Fox*, 298 U. S. 193. Similar reasoning resulted in giving a "business situs" to shares of stock in *First Bank Corporation v. Minnesota*, *supra*, and accounted for the ruling in the

case last quoted (299 U. S. 366), holding that an interest in a membership in the New York Stock Exchange had a "business situs" for taxation in New York, for the reason that "the dominant attribute of relator's membership in the New York Stock Exchange so links it to the situs of the Exchange as to localize it at that place and hence to bring it within the taxing power of New York".

III A—It is evident when its origin and application are studied that the doctrine or fiction of a "business situs" for intangibles developed out of a consideration for the reasonable desire of a state to obtain revenues from a foreign corporation which was doing business within the state under protection of the laws and government of the state. The doctrine was not developed for the purpose of relieving the owner of intangibles from taxation in the state of his legal domicile; but for the purpose of justifying the taxation of the owner of such intangibles by another state wherein he was receiving the benefits of government and should share its burdens.

Where a state uses personal property owned by residents as the basis for levying a tax upon such residents, there is an obvious consistency and justification in levying similar taxes on non-residents when they have property within the state, which can be used as the basis for and measuring rod of taxation. Since intangibles have no physical situs in any state, it seemed reasonable to employ the fiction of a "business situs" in order to give them a situs for taxation in a state wherein such intangibles were actually used by a non-resident in carrying on business within the state. But the reasoning utilized to justify the taxation of a non-resident

doing business within a state, does not justify the exemption of the resident owner of intangibles from taxation by the state of his legal domicile, particularly when no other state is taxing him on the basis of his ownership of the same property.

III B—It is true that the establishment of a "business situs" for taxation of intangibles in a state other than that of the owner's legal domicile has raised a new problem of possible multiple taxation. This problem has not yet been solved by any ruling of the Supreme Court establishing an exclusive power to tax intangibles, either in the state of legal domicile, or in the state or states where a "business situs" for intangibles has been established.

See, *Farmers Loan Company v. Minnesota*, supra, Page 213; *First National Bank v. Maine*, supra, Page 331; *First Bank Corporation v. Minnesota*, supra, Pages 239, 240; *Schuylkill Trust Company v. Pennsylvania*, 302 U. S. 506, 516.

Since the last cited case is the most recent, perhaps it is well to point out that under its ruling the State of Pennsylvania is held to have the power to tax shares of stock in a Pennsylvania corporation, "notwithstanding the ownership of the stock may also be a taxable subject in another state". The opinion of the Court reads, in part, as follows:

* * * "The state constitution for many years prior to the granting of the charter contained the reserved right to alter, amend, and repeal corporate charters, and every stockholder acquired his shares with full knowledge that his interest in the corporation was subject to regulation and taxation.

Moreover, the shares represent a property interest, an aliquot proportion of the whole corporate assets. The shareholders, whether domestic or foreign, depend for the preservation and protection of this property upon the law of the state of the corporation's domicile. The property right so represented is of value, arises where the corporation has its home, and is therefore within the taxing jurisdiction of that state; and this, notwithstanding the ownership of the stock may also be a taxable subject in another state."

POINT IV.

In view of the fact that the doctrine of a "business situs" was evolved in order to support a reasonable exercise of taxing power, it is peculiarly improper to invoke the doctrine as a means to provide corporations with complete immunity from taxation of intangibles, by denying the taxing power of the only state seeking to exercise it! Borrowing the language used by the Court in condemning theories that would lead to multiple taxation, as appropriate for condemnation of a theory that would afford an undeserved immunity from taxation, we urge that "such a startling possibility suggests a wrong premise".

The wrong premise in appellants' argument may be shown by three considerations:

First—The nature and reason for the doctrine of "business situs" is to permit the exercise by a state of its inherent taxing power in such a manner as to provide for an equitable and fair distribution of the burdens of government. It would be an

unwarranted perversion of the doctrine to so misapply it as to deny to a state its inherent taxing power and to prevent an equitable and fair distribution of the burdens of its government.

Second—Just taxation is a practical problem. There are many obvious examples of a coincident or alternative taxing power where, in the absence of any conflict or duplication, there would be no question raised as to the *authority* of more than one state to impose a tax upon the same owner, on the basis of the same property interests. Thus it cannot be contended that the State of New Jersey does not have “jurisdiction” or taxing power to tax corporations created by the state; and (according to the long established rule) to tax such corporations on their intangibles—in the absence of any effort by any other state to tax such corporations upon their intangibles. If, however, by virtue of the “business situs” theory, a coincident taxing power arises in another state, it must obviously be in the nature of an *alternative* taxing power, and in the event of a conflict or duplication the constitutional issue would be: Is there anything in the federal constitution excluding *one* of these states from the exercise of *its* taxing power because of a conflicting, or duplicating, exercise by the *other* state of *its* taxing power?

We submit that the foregoing issue can only arise where there is an *actual* conflict or duplication, and not where there is only the possibility of conflict or duplication—or where, as in the present case, there is *no* possibility of conflict or duplication.

Counsel for appellants endeavor to maintain the position that where one state has “jurisdiction to

tax" no other state can have such "jurisdiction". We submit that this is not the law and that the very doctrine of "business situs" proves that it is not the law, because the Court has repeatedly reaffirmed the "jurisdiction" of the state of the owner's domicile to tax intangibles, despite the possibility that such intangibles might be taxable at a "business situs" in another state. Certainly the "jurisdiction" of a state, that is, its inherent power of taxation, does not *cease*, even though it may be held to be inequitable, or even improper, to exercise such taxing power, so as to tax a person *again* on property as to which taxation by another state may be more justifiable.

Counsel for appellants take the position that the validity of taxation in one state cannot depend upon the question as to whether or not the property taxed is subjected to taxation in another state. But in one of the opinions of this Court particularly relied upon by appellants, *Farmers Loan Company v. Minnesota*, *supra*, it was held as follows:

"*Southern Pacific Co. v. Kentucky*, 222 U. S. 63, indicates plainly enough that the right of one State to tax may depend somewhat upon the power of another so to do. And *Coe v. Errol*, 116 U. S. 517, 524, though frequently cited to support the general affirmation that nothing in the Fourteenth Amendment prohibits double taxation, does not go so far. It affirmed the rather obvious proposition that the mere fact of taxation of tangibles by one State is not enough to exclude the right of another to tax them."

Following up the last sentence of the foregoing quotation, we would point out that if it is an "obvious proposition" that "the mere fact of taxation of tangibles by one State is not enough to exclude the right of another to tax them", then it is a *still more obvious* proposition that the mere fact that intangibles *might* be taxed by another state (which does not in fact tax them) is not enough to exclude the right of the domiciliary state to tax them.

Third—Thus we come to our conclusion that the doctrine of business situs can and should be so interpreted and applied as to sustain appropriate taxation by any state wherein the owner of intangibles engages in business and uses some of the intangibles in that business, *without stretching the doctrine* so that the mere possibility of taxation of intangibles in another state deprives the state wherein the owner has his legal domicile of its "jurisdiction" to tax intangibles in a normal exercise of its coincident or alternative power of taxation.

POINT *N*.

Counsel for appellees contend—

A—That intangibles acquire a business situs for taxation in a foreign state only when—

1—They are essential and integral parts of business conducted in the foreign state—(of which there is no adequate proof in the present record).

2—They are definitely subjected to taxation by the laws of the foreign state—(which is admittedly *not* the case here).

3—They have been correctly determined by authorities of the foreign state (legislative, executive and judicial) to have a "business situs" within such state—(and no such determination has been made or could be made in the present case).

Counsel for appellees further contend—

B—That intangibles do not acquire a business situs through the mere deposit of documentary evidences within a foreign state, or through any activities of their owner which are not *coupled with* the exercise of a justifiable taxing power over such intangibles by the foreign state.

See, *Blodgett v. Silberman*, *supra*; *Baldwin v. Missouri*, *supra*; *Beidler v. So. Car. Tax Commission*, *supra*.

We call attention particularly to the fact that in the case last cited the Court held that application of the principle that intangibles are taxable by the state of the domicile of the deceased owner "is not defeated by the mere presence of bonds or notes, or other evidences of debt, within a State other than that of the domicile of the owner". And in answer to the claim that South Carolina could tax an indebtedness on the ground that it had "what is called a 'business situs' in that State", the opinion significantly held:

"But a conclusion that debts have thus acquired a business situs must have evidence to support it".

Counsel for appellees further contend—

C—That whenever a “business situs” for taxation is actually given to intangibles in a foreign state (in compliance with the requirements outlined in the foregoing paragraph A), then, if the underlying taxing power of the state of the owner’s domicile is to be in any degree curtailed or diminished in its exercise, such diminishment or curtailment should go only to the extent necessary to avoid double taxation. Taxation, as this Court has held, “is an intensely practical matter and laws in respect of it should be construed and applied with a view of avoiding, so far as possible, unjust and oppressive consequences”. (*Farmers Loan Company v. Minnesota*, supra.)

So counsel for appellees conclude and contend—

D—That, when the state of legal domicile provides an exemption from taxation for all properties (including intangibles) of a resident owner which are taxed outside the state, there is no basis for any restraint upon or denial of the constitutional power of the domiciliary state to tax resident owners upon intangibles not elsewhere taxed.

POINT VI.

Perhaps in recognition of the weakness of the “business situs” theory, as a basis for immunity from taxation, counsel for appellants lay considerable stress upon the claim that these corporations have established a “commercial domicile” outside New Jersey, the state of incorporation. Thus they apparently seek to establish a taxing power in the

state of such alleged "commercial domicile" to the exclusion of the original taxing power of the state of incorporation and legal domicile. We submit that although this Court has referred in various opinions to the "commercial domicile" which a corporation may establish outside the state of its incorporation, the Court has not indicated that the establishment of a "commercial domicile" (which we understand to mean only a "place of doing business"), outside the state of incorporation operates to give the corporation anything resembling a new legal domicile, such as may be acquired by an individual who transfers his legal residence from the state of his birth to another state.

We would call attention briefly to the extraordinary consequences that might flow from such a doctrine. We believe it still to be the law, as long ago held by this Court, that a corporation "must dwell in the place of its creation and cannot migrate to another sovereignty". *Bank of Augusta v. Earle*, 13 Pet. 519, 588, cited with approval in *Cream of Wheat Company v. Grand Forks*, supra.

It is not within the power of a corporation to transfer at will its legal domicile, or to change its obligations thereunder. It is within the power of a corporation to establish offices and to do business in another state in accordance with the permission accorded by the laws of such other state. But if the stockholders of a corporation desire to establish the legal domicile of their corporate enterprise in another state, they are required to incorporate in that state. It may be convenient to describe the action of a corporation in establishing offices for the general conduct of its business in a foreign

state as the establishment of a "commercial domicile" therein. But we submit that such an action cannot operate to change the status of the corporation and its obligations within the state which created it, wherein alone it must "dwell" and have its legal domicile.

Let us consider for a moment the consequences of destroying the essential integrity of the legal domicile by the act of transferring business and thus seeking to "migrate" to one or more other states. A large corporation might well establish ten or fifteen main offices for the general conduct of its business in different sections of the country, thus establishing "commercial domiciles" in a dozen states. Then it might distribute the control of its intangibles through these offices, shifting such control and moving the evidences of its intangibles from one jurisdiction to another in the endeavor to avoid, as far as possible, taxation based on these valuable property rights. This is only one example of the unwarranted freedom from responsibilities which might follow upon weakening the sound and long established rule that a corporation has a single legal "domicile" in the state of its incorporation, just as an individual has a single legal residence, wherein the full obligations of the legal domicile must be fulfilled just as an individual may be held to the fulfillment of his legal obligations as a citizen in the state of his legal residence.

We submit that, in addition to the difficulties and the opportunities for tax evasion which arise out of the doctrine of a "business situs", the problem of just taxation should not be complicated by sanctioning another legal fiction, or "metaphor", in the

form of a "commercial domicile", which will increase the difficulties and conflicts of authority involved in levying taxes upon corporations doing business in more than one state. We submit that the "business situs" of intangibles for purposes of taxation depends, not on localization of management, but upon localization of the intangibles. It appears that this conclusion must follow inevitably upon the reasoning of the Court in *New York ex rel. Whitney v. Graves*, supra.

POINT VII.

Counsel for appellants endeavor to support their position by the citation of various decisions of state courts. It does not appear necessary to analyze these decisions further than to point out that, in the first place, there is a serious conflict of authority; and it appears that a majority of the states support taxation by the state of domicile, even though credits are taxed in another state under the "business situs" theory. This is the conclusion of a review of the cases by Professor Brown, appearing in 48 *Harvard Law Review*, 407, under the title of Multiple Taxation by the States.

In the second place, we point out that this conflict of authority definitely supports our position in the present case, which is that a business situs for taxation does not arise until such taxation has been legislatively imposed, executively enforced and judicially approved in a particular state. For example, the Supreme Court of Michigan has repeatedly declined to approve the "business situs" theory to support the taxation of intangibles owned by foreign corporations doing business in that

State, and consistently has approved of the taxation in Michigan of intangibles owned by domestic corporations. The Supreme Court of Michigan has recently held, as follows:

"We again have before us the question of whether the maxim *mobilia sequuntur personam*—movables follow the person—shall be followed in the computation of this excise, or whether we should adopt for convenience the theory of business situs. The same question has been before us on four occasions: *White Bros. Lumber Co. v. Tax Appeal Board*, 222 Mich. 274; *Saginaw Manufacturing Co. v. Secretary of State*, 226 Mich. 1; *In re Portland Hotel Co.*, 232 Mich. 330; *In re Dodge Bros.*, 241 Mich. 665. In each of these cases we have recognized the common law rule that the situs of intangible property is the domicile of its owner, and in the *Dodge Brothers Case* we pointed out that it was within the province of the legislature to change this rule, but that until changed by the legislature, we could not adopt a 'business situs' instead of the situs of the owner for the purposes of the act. Two of these cases involved domestic corporations, two foreign corporations. We applied this rule alike to both classes. It resulted in the use of the intangibles in making the assessment upon the two domestic corporations and their elimination in the cases of foreign corporations. Unless we overrule these cases, which we are not inclined to do, the computation made by the Secretary of State

must be upheld." *In re Truscon Steel Co.*,
246 Mich. 174.

Since the laws of the State of New York do not impose any personal property tax on these foreign corporations, there has been and can be no holding by the courts of the State of New York that the intangibles in question have a "business situs" for taxation in the State of New York. The assumption that these intangibles are "subject" to taxation in New York is not only without foundation, but is contrary to fact. But let us assume that, according to the argument of counsel for appellants, these corporations could by private action establish a "business situs" for intangibles which would make them "subject to taxation" in another state and which would, according to counsel's argument, destroy the jurisdiction of New Jersey to tax them; and then let us make the further reasonable assumption that these corporations should seek to establish such a "business situs" in Detroit, Michigan. Could it be contended that by any holding of a New Jersey court these intangibles could be given a "business situs" for taxation in the State of Michigan, when the highest court of Michigan holds that a foreign corporation cannot make its intangibles subject to taxation in Michigan—that is, cannot give such intangibles a "business situs" for taxation in the State of Michigan?

We submit that the conflict of authority in the state courts again emphasizes our original point to the effect that the intangibles here in question have not been given a "business situs" for taxation in the State of New York and that, therefore, there is no basis for questioning the normal taxing power

of the State of New Jersey—the power to tax these intangibles at the legal domicile of the owner in New Jersey.

We should also call attention to the pertinent decision of the Circuit Court of Appeals of the Tenth Circuit in a case involving the right of Oklahoma to tax stocks and bonds owned by an Oklahoma corporation but held by the corporation at its general office in Wichita, Kansas. The corporation alleged that the stocks and bonds held in Wichita had acquired a business and taxable situs in Kansas and were not taxable in Oklahoma; although it was not alleged that the stocks and bonds had ever been taxed in Kansas. The court held these intangibles taxable by Oklahoma, the legal domicile of the Oklahoma corporation, citing *Blodgett v. Silberman*, supra, and *First National Bank v. Maine*, supra. The following quotation from its opinion is pertinent to the present issue:

“The pleader here tried to bring this case within claimed exceptions to the general rule by alleging that the stocks and bonds had acquired a business and taxable situs at Wichita in the State of Kansas, but it seems obvious from the allegations of the bill that they were purchased with surplus funds not needed at the time in appellant’s business, and it is difficult to see how they would become associated with and a part of business activities carried on in Kansas and taxable there.” *Rounds & Porter Lumber Co. v. Livesay*, 66 F. (2d) 298.

Recognizing that this Court is properly concerned with the avoidance of multiple taxation wherever

that is possible and justifiable, we submit that the most practical and desirable way to avoid multiple taxation, while at the same time sustaining unimpaired the sovereign power of each state to tax appropriately persons and corporations legally domiciled within the state, is that method adopted by the State of New Jersey in providing a specific exemption from taxation for the personal property owned by citizens and corporations domiciled in the state which is actually taxed outside the state. We submit that the taxing power of a state which so fairly restricts the exercise of its own power, which so generously defers to the assertion of any conflicting or coincident taxing power by another state, should not have its taxing power destroyed or diminished by the evolution of a constitutional prohibition born of such a union of legal fiction and false logic as is attempted in aid of the present appeal.

POINT VIII.

Counsel for appellees would be derelict if they did not point out that appellants are seeking in the present case to take advantage of their violation of statutory obligations as a means of evading taxation otherwise clearly within the power of the state of incorporation. We have regarded the major issues in this case as of so much greater importance that we have not stressed this minor issue; although it might well be a decisive one.

The laws of New Jersey, under which these corporations were chartered, required the corporate charter to state "the place where the principal office of said company is to be located and its general business to be conducted, *which shall be within*

this State". 2 Compiled Statutes, 2839, Amended Laws, 1929, Chapter VI, page 18¹.

This requirement was still in effect at the time when the taxes here involved were imposed. These corporations had represented, and presumably were continuing to represent in annual reports, that they had their principal office where the general business of the corporation was conducted within the State of New Jersey. If they had continued to fulfill this statutory obligation, there would presumably have been no question as to the validity of the taxes imposed when each of these corporations was assessed, as required by law, upon "the full amount of its capital stock paid in and accumulated surplus"—minus the amount of any assessment upon real estate, and after deduction of any property exempt because actually assessed and taxed outside the state.

But, in order to provide a basis for avoiding the payment of taxes properly levied under the law of the State upon a domestic corporation maintaining, as required by its statute, its principal office and the general conduct of its business within the State, these corporations asserted their wilful violation of statutory obligations in alleging that they had transferred their principal offices and the general conduct of their business to another State. Specifically, Newark Fire Insurance Company alleged the transfer of its executive offices and the conduct of the general business of the company "since appellant moved its main office from Newark six years ago". (Newark R. page 15.) The Uni-

¹ Although, as previously pointed out, the Newark Company was chartered by a Special Act, it is also subject to this statutory requirement.

versal Companies, through the testimony of Vice-President and Secretary Byrne, testified that the "principal business office" of the companies was at 111 Johns Street, New York City, on the assessment date, October 1, 1934, and that the business of the companies was "conducted from that office", *through a management corporation*. (Universal R. pp. 30, 31.)

Whether the conduct of business through a management corporation in the State of New York would or would not provide the basis for a "business situs" for the taxation of intangibles in that State might be a vital issue if the question of "business situs" were to be submitted to a competent court of the State of New York for a decision. In view, however, of our belief that there has been no effective legal finding that any intangibles of any of the appellants have a "business situs" for taxation in New York, we will not stress this minor point.

In conclusion, however, on our last major point, we do submit that, since appellants can only challenge the taxing power of the State of New Jersey by alleging that they have removed themselves and their property from the "jurisdiction" of the State, in violation of statutory obligations, we would seriously question whether they should be permitted to take advantage of their own wrong as a means of evading taxation otherwise undoubtedly within the power of the state of incorporation.

CONCLUSION

It is respectfully submitted that, for the reasons urged herein, either the appeal should be dismissed

for want of jurisdiction, or the judgment of the New Jersey Court of Errors and Appeals should be affirmed.

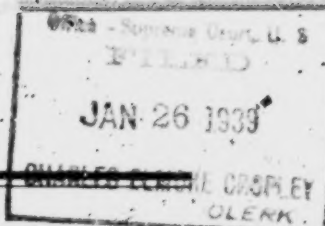
Respectfully submitted,

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Supreme Court of the United States

October Term, 1938

No. 456

UNIVERSAL INSURANCE COMPANY AND
UNIVERSAL INDEMNITY INSURANCE COMPANY
Appellants
against

STATE BOARD OF TAX APPEALS OF THE STATE
OF NEW JERSEY AND CITY OF NEWARK
Respondents

BRIEF OF APPELLANTS

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POINTS

I

Sections 202, 301 and 307 of Chapter 236 of the Session Laws of 1918 of the State of New Jersey as construed and applied by the New Jersey Supreme Court and the Court of Errors and Appeals are in violation of the Fourteenth Amendment of the Constitution of the United States in that (a) said sections as so construed and applied operate to tax intangible property of the appellants which has its permanent situs in the State of New York and is beyond the jurisdiction of the taxing district of the City of Newark, and the State of New Jersey; and (b) said sections as so construed and applied subject such property of appellants to multiple taxation

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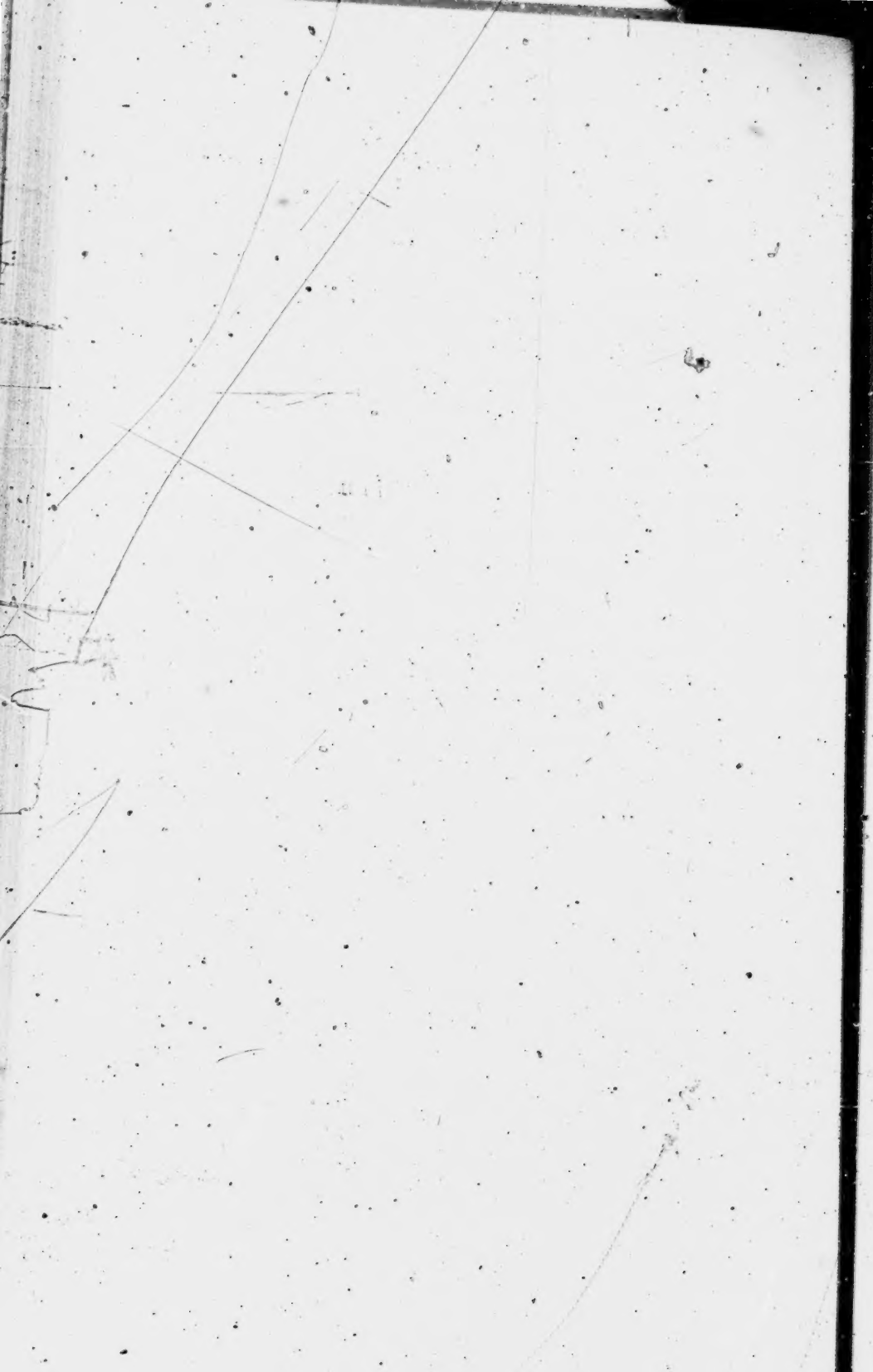
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STATE BOARD OF TAX APPEALS OF THE
STATE OF NEW JERSEY and CITY OF
NEWARK,

Respondents.

No. 456

BRIEF OF APPELLANTS

This is an appeal from a judgment of the New Jersey Court of Errors and Appeals affirming a judgment of the New Jersey Supreme Court which sustained the validity of a personal property tax assessed as of October 1, 1934, for the year 1935, by the City of Newark upon the appellants' capital and paid-in and accumulated surplus.

The official report of the *per curiam* opinion of the Court of Errors and Appeals in the case below appears in 120 N. J. Law 185 (R. p. 57). The official report of the opinion of the New Jersey Supreme Court below appears in 118 N. J. Law 538 (R. p. 45). The official report of the opinion in the companion case of *Newark Fire Insurance Company v. State Board of Tax Appeals*, which is incorporated in the opinions below, appears in 118 N. J. Law 525 (see Appendix, p. 26).

Statement of Grounds for Jurisdiction

The statute believed to sustain the jurisdiction of the Court is Chapter 229 of the Laws of 1925, 43 Statutes 937, U. S. Code Annotated, Title 28, Section 344-a which reads as follows:

"A final judgment or decree in any suit in the highest court of a State in which a decision in the suit could be had, where is drawn in question the validity of a treaty or statute of the United States, and the decision is against its validity; or where is drawn in question the validity of a statute of any State, on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, and the decision is in favor of its validity, may be reviewed by the Supreme Court upon a writ of error. The writ shall have the same effect as if the judgment or decree had been rendered or passed in a court of the United States. The Supreme Court may reverse, modify, or affirm the judgment or decree of such State court, and may, in its discretion, award execution or remand the cause to the court from which it was removed by the writ."

The statutes of the State of New Jersey, the validity of which is involved, are Chapters 236 of the Laws of 1918, Sections 202, 301 and 307 (see Appendix, p. 29). These sections were in effect at the time the tax in question was levied but have since been revised and are found in Revised Statutes of the State of New Jersey 1937, Secs. 54:4-1, 54:4-9, 54:4-22 (see Appendix, p. 30).

The date of the judgment sought to be reviewed is May 31, 1938, and the date upon which the application for the appeal was made is August 22, 1938 (R. p. 53).

History of Case Below.

The appellants are New Jersey corporations, with registered offices in Newark, New Jersey (R. p. 27). Both of the corporations had on October 1, 1934, and now have, their principal offices in the City of New York from which their entire business was managed and operated (R. pp. 27-38). Under the New Jersey statutes above cited, the Board of Assessment and Revision of Taxes of the City of Newark, as of October 1, 1934, the taxing date fixed by the statute made an assessment upon the entire capital

stock paid-in and accumulated surplus of each corporation, the effect of which, as found by the Courts below, was to impose a tax upon intangible personal property having its permanent business situs in New York. These assessments reduced in amount were confirmed by the Essex County Board of Taxation (R. pp. 1 and 16).

Appeals were taken by both appellants to the New Jersey State Board of Tax Appeals, where a trial *de novo* was held (R. pp. 3 and 19). The State Board of Tax Appeals filed an opinion dismissing the application (R. p. 9) and judgments were entered confirming the judgments of the Essex County Board of Taxation (R. pp. 11 and 25). In these appeals the question of the jurisdiction of the City of Newark to make the assessment and to levy the tax was raised by the appellants (R. pp. 3 and 19) and was decided adversely to the appellants under the opinion of the same Board, in the case of *Newark Fire Insurance Company v. City of Newark* (R. p. 9).

Writs of certiorari were allowed by the New Jersey Supreme Court to review the judgments of the State Board of Tax Appeals (R. pp. 1 and 17), and in that Court the cases were consolidated (R. p. 26). The question of the jurisdiction to tax was the first point raised by the appellants before the Supreme Court (R. p. 42), and was decided adversely to the appellants on the basis of the decision of that court in the case of *Newark Fire Insurance Company v. State Board of Tax Appeals*, 118 N. J. Law 525 (Appendix, p. 26). The judgment of the State Board of Tax Appeals was affirmed (R. p. 45).

From the judgment of the Supreme Court (R. p. 44) an appeal was taken to the Court of Errors and Appeals, the highest court of the State of New Jersey. This appeal related to the whole of the judgment of the Supreme Court, the grounds of appeal being that the Supreme Court erred in affirming the judgment of the State Board of Tax Appeals in dismissing the writ of certiorari (R.

p. 49). The Court of Errors and Appeals in a per curiam opinion, affirmed for the reasons set forth in the opinion of the Supreme Court (R. p. 57); and an order of affirmance and judgment were entered on May 31, 1938 (R. p. 58). It is from that judgment that the present appeal is taken.

Federal Question Presented.

The case before the Court presents the following Federal question:

Can the City of Newark or State of New Jersey, without violating the Fourteenth Amendment, tax intangible personal property of a New Jersey corporation, which property on the taxing date had a permanent business situs in another State?

This question was presented by the appellants before the New Jersey Supreme Court, and was actually decided by that Court. See opinion in that Court below (R. p. 45) incorporating the opinion of the same Court in the companion case of *Newark Fire Insurance Company v. State Board of Tax Appeals*, 118 N. J. Law 525 (Appendix, p. 31).

The notice of appeal to the New Jersey Court of Errors and Appeals (R. p. 49) raised every issue decided by the Court below. (*Thompson v. East Orange*, 94 N. J. Law 106, *State v. Verona*, 93 N. J. Law 389.)

The Court of Errors and Appeals, in a per curiam opinion, affirmed the judgment of the Supreme Court for the reasons expressed in the opinion of the Supreme Court (R. p. 57).

The question of jurisdiction went to the whole case, for the other questions considered by the Supreme Court and by the Court of Errors and Appeals related simply to the amount of the tax, and were relevant only on the assumption that the property assessed was within the taxing power of the City of Newark.

The case, therefore, comes within the rule laid down by this Court in *Lynch v. New York, ex rel. Pierson*, 293 U. S. 52, 79 Law, Ed. 191, in that it appears from the record that a Federal question was duly presented for decision to the highest court of the State, that the decision of the Federal question was necessary for the determination of the case, that the question was actually decided, and that the judgment appealed from could not have been given without deciding it.

The question raised by this appeal is substantial. It is one of great importance at the present time as it is a matter of public record that since this case has been docketed personal property assessments have been levied by the city of Jersey City and other cities of the State of New Jersey against hundreds of New Jersey corporations having only registered offices in such cities with substantially all of their assets in the form of intangible personal property outside of the State of New Jersey. The validity of such a tax under the Constitution, the same question which is now before the Court, is squarely raised by all of these assessments.

Statement of the Case

Findings Relating to the Situs of the Property Taxed, and Evidence Supporting Such Findings.

The New Jersey Supreme Court, after reviewing the testimony before the New Jersey Board of Tax Appeals (and considering additional testimony, most of which was not material to the question here presented), found as follows:

"The facts in the case at bar are practically identical, save as to the names of the parties, their respective addresses here and in New York, and the figures with those set forth in the case of

Newark Fire Insurance Company v. State Board of Tax Appeals (Supreme Court), 118 N. J. L. 525" (R. p. 45).

The findings and the conclusions with respect to the situs of the property taxed, are stated by the Supreme Court in its opinion in the *Newark Fire Insurance Company* case, as follows:

"Prosecutor is a general fire insurance company organized under the laws of this state with its registered office at 31 Clinton Street, in the City of Newark. For six years prior to the assessment its main and executive offices have been and now are at 150 William Street, in the City of New York. Prosecutor's general business is conducted in New York, and all the books of the company, except those required by law to be kept at its registered office in New Jersey, are located there. Although a small amount of cash and some few securities are kept in New Jersey so that business may be done here, the great majority of these items is either in the New York offices or in banks in that State. The business conducted at the Newark office is confined to local regional underwriting and the adjustment of claims arising therefrom. Reports on such business are sent to the main office in New York. * * *

"FIRST: *As to jurisdiction to tax prosecutor in this State.* This question must, in the light of the proofs, be considered upon the inescapable premise that prosecutor had its business situs as of October 1, 1934, and still has it, in New York; that the securities, the personalty involved, have become an integral part of its business situs in New York; but that prosecutor pays no personal property tax to the State of New York" (see Appendix, pp. 31-32).

This finding that the situs of the appellants and of their intangible property is in New York has not so far been questioned.

7
In the case of *Aetna Life Insurance Company v. Dun-*
ken, 266 U. S. 388; 69 Law Ed. 342, at page 347, this Court
said:

"The rule is settled that the decision of a State court upon a question of fact ordinarily cannot be made the subject of inquiry here. See, for example, *Missouri, K. & T. R. Co. v. Haber*, 169 U. S. 613, 639; *Smiley v. Kansas*, 196 U. S. 447, 453-454. To this general rule there are two equally well settled exceptions: '(1) Where a Federal right has been denied as the result of a finding shown by the record to be without evidence to support it, and (2) where a conclusion of law as to a Federal right and findings of fact are so intermingled as to make it necessary, in order to pass upon the Federal question, to analyze the facts.' *Northern Pacific Ry. Co. v. North Dakota*, 236 U. S. 585, 593, and cases cited. See also *Traux v. Corrigan*, 257 U. S. 312, 324-325."

It is submitted that the present case comes within the rule as above stated and does not come within either of the exceptions.

There is no claim that a Federal right has been denied as a result of a disputed finding of fact which is unsupported by the evidence. On the contrary, the appellants accept the findings of the New Jersey Supreme Court with respect to the situs of the property sought to be taxed, amply supported by the evidence. The appellants claim that such findings are the most adverse possible to the right herein asserted by the State of New Jersey. The case, therefore, does not come within the first exception stated above, nor within the principle of *Beidler v. South Carolina*, 282 U. S. 1, 75 Law Ed. 131, where the facts were in dispute and the findings of the State Court as to the situs of the property sought to be taxed was favorable to the right asserted by the State.

Nor does the case come within the second exception laid down in the *Aetna Life Insurance* case. The conclusions of law and the findings of fact are not intermingled in any sense, but are separate and distinct. The New Jersey court has made a clear finding as to the situs of the property taxed upon facts which are not in dispute and based upon these facts has concluded as a matter of law that the property could be taxed in the State of New Jersey. The appellants accept the finding of fact and take exception solely to the conclusions of law. The case, therefore, presents a single question, which is purely a question of law.

The evidence in the present case supporting the foregoing finding will be found at pages 27 to 38 of the record. The following is a summary of such testimony:

Both the appellants, the Universal Insurance Company and the Universal Indemnity Insurance Company, are New Jersey corporations (R. p. 27). Both corporations on October 1, 1934, had registered offices at 810 Broad Street, in the City of Newark, New Jersey (R. p. 27). The principal business office of both corporations on October 1, 1934, was and previously had been at 111 John Street, in the City of New York (R. p. 30). All the business of both appellants was conducted from the New York office, through a Management Corporation, Talbot, Bird & Company, Inc., a New York corporation (R. p. 31). The business of the Universal Insurance Company is principally marine insurance, with some fire and inland marine insurance (R. p. 31). The business of Universal Indemnity Insurance Company is automobile liability and property damage insurance (R. p. 31). From their New York office both companies did business through agents throughout the United States (R. p. 31). All premiums collected by both companies were paid to the New York office (R. p. 31). All underwritings were reported by the agents to the New

York office for acceptance (R. p. 32). The auditing departments of both companies were at the New York office (R. p. 32). All bank accounts of both companies, with the exception of a small bank account at the National Newark & Essex Bank, in Newark, were in New York (R. p. 31). All securities owned by both companies on October 1, 1934, were in New York (R. p. 32), with the exception of securities deposited with the Superintendents of Insurance of the various States in which the companies did business, as a condition to doing business in such States (R. p. 32). Both companies had a service agency for writing insurance at No. 51 Clinton Street, in the City of Newark, and had other agents throughout the State of New Jersey, as in other States (R. p. 31). The agents of the companies in Newark remitted to New York all premiums which were collected (R. p. 32). They had no control over the investment or management of the funds of the companies (R. p. 32). The securities deposited by the appellants with the New Jersey Commissioner of Insurance of the State of New Jersey, at Trenton, on October 1, 1934, were:

By the Universal Insurance Company, \$60,000. of United States bonds.

By the Universal Indemnity Insurance Company, \$50,000. of United States bonds and \$150,000. of New Jersey Municipal Bonds (R. p. 34).

The balance sheets of appellants as of September 30, 1934, are set forth on pages 8 and 24 of the Record.

The Tax in Dispute.

As of October 1, 1934, the Board of Assessment and Revision of Taxes of the City of Newark made an assess-

ment of \$500,000 against each of the appellants on their capital stock, paid-in and accumulated surplus, as the basis for taxation for the year 1935. On appeal to the Essex County Board of Taxation these assessments were reduced to the following figures (R. pp. 1 and 16):

Against the Universal Insurance Company	\$455,400
Against the Universal Indemnity Insurance Company	\$381,000

The computation of these assessments as reduced is set forth in the stipulations before the State Board of Tax Appeals, at pages 7 and 23 of the Record. The assessments were computed upon the entire capital stock and accumulated surplus of each corporation, adding thereto the unearned premium reserve and certain agency balances due, and deducting therefrom the exemptions allowed by law, to wit, bonds of the United States, bonds of municipalities of the State of New Jersey, and stocks of corporations. The bonds belonging to the appellants held by the Commissioner of Insurance of New Jersey were all included in such exemptions allowed by law, and therefore were not included in the property taxed (R. pp. 7, 23 and 33).

No attempt was made to separately value and tax the intangibles arising from the business conducted by the appellants in the State of New Jersey (R. pp. 7 and 23).

The history of the subsequent appeals appears at pages 3-4, *supra*, under the discussion of the grounds for jurisdiction.

Specification of Assigned Errors Intended to Be Urged

The appellants have heretofore adopted their assignments of error Nos. 1 and 2 (R. p 53) as their statement of the points to be relied on in conformity with Rule 13

and the same were duly filed (R. p. 59). The following are the assigned errors intended to be urged:

1. The judgment of the Court of Errors and Appeals of the State of New Jersey was erroneous and illegal in affirming the judgment of the New Jersey Supreme Court, and in holding valid the assessments for personal property taxes for the year 1935, levied by the City of Newark, under Sections 202, 301 and 307 of Chapter 236 of the Session Laws of 1918 of the State of New Jersey (Revised Statutes of New Jersey of 1937, Sections 54:4-1, 54:4-9 and 54:4-22) against the intangible personal property of appellants, constituting appellants' capital stock paid-in and accumulated surplus, because the business situs of appellants and of the intangible personal property assessed and taxed, on October 1, 1934, was located in the City and State of New York, beyond the jurisdiction of the taxing district of the City of Newark and the application of the said Sections of the Statute in holding said assessments valid, rendered the said Sections of the said Statute repugnant to the Fourteenth Amendment of the Constitution of the United States, depriving appellants of their property without due process of law and denying the appellants equal protection of the laws.

2. The judgment of the Court of Errors and Appeals of the State of New Jersey was erroneous and illegal in affirming the judgment of the New Jersey Supreme Court, and in holding valid the assessments for personal property taxes for the year 1935, levied by the City of Newark against the intangible personal property of appellants, constituting appellants' capital stock paid-in and accumulated surplus, under Sections 202, 301 and 307 of Chapter 236 of the Session Laws of 1918 of New Jersey (Revised Statutes of New Jersey of 1937, Sections 54:4-1, 54:4-9 and 54:4-22), because upon the assessing and taxing date, October 1, 1934, said intangible personal prop-

erty constituting appellants' capital stock, paid-in and accumulated surplus, was outside of the jurisdiction of the taxing district of the City of Newark, the business situs of appellants and of said taxed intangible personal property being on said date located in the City and State of New York, and the said Court in so holding said assessments valid, did administer and apply the said Sections of the said Statute so as to render them repugnant to the Fourteenth Amendment of the Constitution of the United States, depriving appellants of their property without due process of law, and denying the appellants the equal protection of the laws.

Summary of Argument.

1. Sections 202, 301 and 307 of Chapter 236 of the Session Laws of 1918 of the State of New Jersey as construed and applied by the New Jersey Supreme Court and the Court of Errors and Appeals are in violation of the Fourteenth Amendment of the Constitution of the United States in that (a) said sections as so construed and applied operate to tax intangible property of the appellants which has its permanent situs in the State of New York and is beyond the jurisdiction of the taxing district of the City of Newark, and of the State of New Jersey; and (b) said sections as so construed and applied by the New Jersey Courts subject such property of appellants to multiple taxation.

2. The property sought to be taxed by the City of Newark is subject to taxation by the State of New York.

3. The fact that the appellants do not pay a personal property tax in New York is of no significance.

I

Sections 202, 301 and 307 of Chapter 236 of the Session Laws of 1918 of the State of New Jersey as construed and applied by the New Jersey Supreme Court and the Court of Errors and Appeals are in violation of the Fourteenth Amendment of the Constitution of the United States in that (a) said sections as so construed and applied operate to tax intangible property of the appellants which has its permanent situs in the State of New York and is beyond the jurisdiction of the taxing district of the City of Newark, and the State of New Jersey; and (b) said sections as so construed and applied subject such property of appellants to multiple taxation.

The statutes of the State of New Jersey, the validity of which is involved, are Chapter 236 of the Laws of 1918, Sections 202, 301 and 307. These statutes are printed in the appendix, pages 29 and 30.

The tax imposed by these sections is an *ad valorem* tax and not a franchise tax. (*Newark Fire Insurance Company v. State Board of Tax Appeals, supra.*) As we have seen above, the New Jersey Supreme Court, upon undisputed evidence, found that the business situs of the appellants was in New York and that the property sought to be taxed had become an integral part of its business situs in that State. In spite of this finding, the New Jersey Supreme Court, following its decision in the *Newark Fire* case, sustained the tax in question upon the theory that such property was, nevertheless, subject to tax by the State of the appellants' domicile. It based such decision squarely upon the decision of this Court in the case of *Cream of Wheat Company v. County of Grand Forks*, 253 U. S. 325. While recognizing that serious doubt had been cast on the authority of the *Cream of Wheat Company*

case by later decisions of this Court, the New Jersey Supreme Court went on to state:

"While this doubt has been cast by the highest court of our land, that body has never expressly overruled its decision in the *Cream of Wheat* case. Until such time as that case is reconsidered we are bound by its holdings that there is a sufficient interrelation between the State of domicile and the intangibles which have acquired a business situs elsewhere to justify the imposition of a personal property tax by the former upon the latter" (Appendix, p. 34).

It is the contention of the appellants that the New Jersey Supreme Court reached a wrong conclusion as to the authority of the *Cream of Wheat Company* case in the present state of the law.

The decisions in the *Cream of Wheat* case and in the case of the *Citizens National Bank v. Durr*, 257 U. S. 99, which followed it, were based upon the following propositions:

1. That the limitation imposed by the Fourteenth Amendment that a State may not tax a resident for property which has acquired a business situs beyond its boundaries has no application to intangible property.
2. That the Fourteenth Amendment does not prohibit double taxation.

It is respectfully submitted that the decisions of the Supreme Court, since these decisions were rendered, have departed entirely from these propositions.

At the time the *Cream of Wheat* case and the *Citizens National Bank* case were decided, this Court had already held in *Union Transit Company v. Kentucky*, 199 U. S. 194, that a State could not, under the Fourteenth Amendment, tax the tangible personal property of a domestic corporation which had a permanent situs outside the State.

At page 202 of its opinion in that case, the Court made the following statement with respect to the basis of the power to tax:

"The power of taxation, indispensable to the existence of every civilized government, is exercised upon the assumption of an equivalent rendered to the taxpayer in the protection of his person and property, in adding to the value of such property, or in the creation and maintenance of public conveniences in which he shares, such, for instance, as roads, bridges, sidewalks, pavements, and schools for the education of his children. If the taxing power be in no position to render these services, or otherwise to benefit the person or property taxed, and such property be wholly within the taxing power of another State, to which it may be said to owe an allegiance and to which it looks for protection, the taxation of such property within the domicile of the owner partakes rather of the nature of an extortion than a tax, and has been repeatedly held by this court to be beyond the power of the legislature and a taking of property without due process of law. • • •"

The protection of the Fourteenth Amendment against double taxation, however, at that time had not been extended to intangible personal property. *Blackstone v. Miller*, 188 U. S. 189, 47 Law Ed. 439, and the cases which followed it, sustaining the principle of the multiple taxation of intangible property, were still the law, and remained the law down to the decision of this Court in *Farmers Loan & Trust Company v. Minnesota*, 280 U. S. 204; 74 Law Edition 371.

In the *Farmers Loan & Trust Company* case this Court held that a State could not impose an inheritance tax upon debts owing by a resident of the State to a non-resident decedent, but that such debts were subject to taxation at the domicile of the creditor. In this decision the Court considered the possible places for the taxation of debts and defi-

nately set its face against the double taxation of such property. We quote from the decision, pages 209, 210:

"Four different views concerning the situs for taxation of negotiable public obligations have been advanced. One fixes this at the domicile of the owner; another at the debtor's domicile; a third at the place where the instruments are found—physically present; and the fourth within the jurisdiction where the owner has caused them to become integral parts of a localized business. If each state can adopt any one of these and tax accordingly, obviously, the same bonds may be declared present for taxation in two, or three, or four places at the same moment. Such a startling possibility suggests a wrong premise.

"In this Court the presently approved doctrine is that no State may tax anything not within her jurisdiction without violating the Fourteenth Amendment.

• • • • •
 "Nor is it permissible broadly to say that notwithstanding the Fourteenth Amendment, two States have power to tax the same personalty on different and inconsistent principles or that a State always may tax according to the fiction that in successions after death *mobilia sequuntur personam* and domicile govern the whole. *Union Refrig. Transit Co. v. Kentucky*, *supra*, *Rhode Island Trust Co. v. Doughton*, *supra*, and *Safe Deposit & Trust Co. v. Virginia*, *supra*, stand in opposition.

• • • • •
 "While debts have no actual territorial situs we have ruled that a State may properly apply the rule *mobilia sequuntur personam* and treat them as localized at the creditor's domicile for taxation purposes. Tangibles with permanent situs therein, and their testamentary transfer, may be taxed only by the State where they are found. And, we think, the general reasons declared sufficient to inhibit taxation of them by two States apply under present circumstances with no less force to intangibles with

taxable situs imposed by due application of the legal fiction. Primitive conditions have passed; business is now transacted on a national scale. A very large part of the country's wealth is invested in negotiable securities whose protection against discrimination, unjust and oppressive taxation, is matter of the greatest moment. Twenty-four years ago *Union Refrig. Transit Co. v. Kentucky*, *supra*, declared: " . . . in view of the enormous increase of such property (tangible personalty) since the introduction of railways and the growth of manufactures, the tendency has been in recent years to treat it as having a situs of its own for the purpose of taxation, and correlatively to exempt (it) at the domicile of the owner.' And, certainly, existing conditions no less imperatively demand protection of choses in action against multiplied taxation whether following misapplication of some legal fiction or conflicting theories concerning the sovereign's right to exact contributions. For many years the trend of decisions here has been in that direction."

The principles laid down in the *Farmers Loan & Trust Company* case, that between the States of the Union the same property, whether tangible or intangible, shall not be subject to taxation in more than one State, and that the power to tax intangible property is determined by its situs, as in the case of tangible property, have been firmly established by the decisions of this Court since that decision. The establishment of these principles cannot be better stated than in the following excerpt from the opinion of this Court in *Burnet v. Brooks*; 288 U. S. 378, at page 401:

"Due process requires that the limits of jurisdiction shall not be transgressed. That requirement leaves the limits of jurisdiction to be ascertained in each case with appropriate regard to the distinct spheres of activity of State and Nation. The limits of State power are defined in view of the relation of the States to each other in the Fed-

eral Union. The bond of the Constitution qualifies their jurisdiction. This is the principle which underlies the decisions cited by respondents.* These decisions established that proper regard for the relation of the States in our system required that the property under consideration should be taxed in only one State and that jurisdiction to tax was restricted accordingly. In *Farmers Loan & Trust Co. v. Minnesota*, *supra*, the Court applied the principle to intangibles, and referring to the contrary view which had prevailed, said (p. 209): 'The inevitable tendency of that view is to disturb good relations among the States & to produce the kind of discontent expected to subside after establishment of the Union. The Federalist, No. VII: The practical effect of it has been bad; perhaps two-thirds of the States have endeavored to avoid the evil by resorting to reciprocal exemption laws.' It was this 'rule of immunity from taxation by more than one State,' deducible from the decisions in respect of various and distinct kinds of property, that the Court applied in *First National Bank v. Maine*, *supra*, page 326.

"As pointed out in the opinion in the *First National Bank* case, the principle has had a progressive application. In *Louisville & Jeffersonville Ferry Co. v. Kentucky*, 188 U. S. 385, the question related to a ferry franchise granted by Indiana to a Kentucky corporation, which Kentucky attempted to tax. Despite the fact that the tax was laid upon a property right belonging to a domestic corporation, the Court held that the Fourteenth Amendment precluded the imposition. *Id.*, p. 398. In *Union Refrigerator Transit Co. v. Kentucky*, 199 U. S. 194, the principle was applied to the attempted taxation by Kentucky of tangible personal property which was owned by a domestic corporation but had

* The cases referred to by the Court earlier in the opinion as having been cited by the respondent were: *Farmers Loan & Trust Co. v. Minnesota*, 280 U. S. 204; *Baldwin v. Missouri*, 281 U. S. 586; *Beidler v. South Carolina Tax Commission*, 282 U. S. 1; *First National Bank v. Maine*, 284 U. S. 312.

a permanent situs in another State. The Court decided that where tangible personal property had an actual situs in a particular State, the power to subject it to state taxation rested exclusively in that State regardless of the domicile of the owner. By *Frick v. Pennsylvania*, 268 U. S. 473, the rule became definitely fixed that as to tangible personal property the power to impose a death transfer tax was solely in the State where the property had an actual situs, and could not be exercised by another State where the decedent was domiciled. See *First National Bank v. Maine*, *supra*, p. 322. The decision in *Farmers Loan & Trust Co. v. Minnesota*, *supra*, overruling *Blackstone v. Miller*, 188 U. S. 189, carried forward the principle by applying it to intangibles. The Court was of the opinion that 'the general reasons declared sufficient to inhibit taxation of them [tangibles] by two States apply under present circumstances with no less force to intangibles with taxable situs imposed by due application of the legal fiction. Primitive conditions have passed; business is now transacted on a national scale. A very large part of the country's wealth is invested in negotiable securities whose protection against discrimination, unjust and oppressive taxation is matter of the greatest moment.' 280 U. S. pp. 211, 212."

To review in further detail the cases cited in the foregoing opinion, would seem to serve no useful purpose. As therein stated, they have conclusively established that the limitations of the Fourteenth Amendment apply to the taxation of intangible property as well as of tangible property, and that today intangible property, like tangible property, is subject to taxation in only one State of the United States.

While the cases in which this principle was laid down by this Court have in the main involved the right of the State of the owner's domicile to impose a tax to the exclusion of other States, the Court has clearly indicated that it is aware that the same rule might exclude a tax by the State of the owner's domicile. In the case of

Farmers Loan & Trust Company v. Minnesota, *supra*, at the conclusion of the opinion, page 213, evidently to dispel any inference that the application of the rule against double taxation in the instant case to sustain the power of the state of the owner's domicile to tax, impaired the principle of the separate business situs of intangible property, the Court said:

"*New Orleans v. Stempel*, 175 U. S. 309, *Bristol v. Washington County*, 177 U. S. 133, *Liverpool & L. & G. Ins. Co. v. Orleans Assessors*, 221 U. S. 346, recognize the principle that choses in action may acquire a situs for taxation other than at the domicile of their owner if they have become integral parts of some local business. The present record gives no occasion for us to inquire whether such securities can be taxed a second time at the owner's domicile."

In *First National Bank v. Maine*, 284 U. S. 312, at page, 331, the Court said:

"We do not overlook the possibility that shares of stock, as well as other intangibles, may be so used in a State other than that of the owner's domicile as to give them a situs analogous to the actual situs of tangible personal property. See *Farmers Loan Company case*, *supra*, at page 213. That question heretofore has been reserved and it still is reserved to be disposed of when, if ever, it properly shall be presented for our consideration."

In other cases decided since the *First National Bank* case this Court has made the same reservation. In the recent case of *New York ex rel. Whitney v. Graves*, 299 U. S. 366; 81 Law Ed. 285, in which this Court sustained a tax by the State of New York upon a membership in the New York Stock Exchange owned by a resident of another State, the Court, referring to the case of *Citizens National Bank v. Durr*, *supra*, at page 373 said:

"In *Citizens National Bank v. Durr*, 257 U. S. 99, a membership in the New York Stock Exchange,

owned by a resident of Ohio, was held to be subject to taxation at his domicile. But the Court was careful not to question the jurisdiction of the State of New York to tax 'the membership privileges exercisable locally' in that State * * * and *what the Court said with respect to double taxation must be read in the light of the decisions in Farmers Loan & Trust Co. v. Minnesota, supra, and later cases upon that point. See Wheeling Steel Corp. v. Fox, supra.*" (Italics ours.)

This was a clear intimation by the Court that the decisions in the *Cream of Wheat* and *Citizens National Bank* cases were inconsistent with the subsequent cases of the Court.

It is respectfully submitted that the time has come for this Court to hold that the rule laid down in the *Cream of Wheat Company* case and in *Citizens National Bank v. Durr*, that the Fourteenth Amendment does not prohibit double taxation and that a State may tax a resident on intangible property which has acquired a permanent situs beyond its borders, is no longer the law.

II

The property of appellants sought to be taxed by the City of Newark is subject to taxation only by the State of New York.

Assuming that under the Fourteenth Amendment as interpreted by the decisions above referred to intangible property cannot be subjected to taxation by more than one State, the question arises—Is the property here sought to be taxed subject to taxation by any other State than New Jersey? The answer to this inquiry is found in *Wheeling Steel Corporation v. Fox*, 298 U. S. 193; 80 Law Ed. 1143; and in *First Bank Stock Corporation v. Minnesota*, 301 U. S. 234; 81 Law Ed. 1061.

In the *Wheeling Steel Corp.* case the Court held that when a Delaware corporation maintained its principal business office in West Virginia from which its entire business was managed and directed, all its accounts receivable and bank balances (except such as the parties agreed were applicable to the business conducted in Ohio) thereby acquired a business situs in West Virginia and were subject to taxation there. It was argued that such a decision would subject the intangibles in question to the possibility of double taxation by Delaware, the State of domicile. Upon this point the Court made the following observations, page 210 of the opinion.)

"It is appellant's contention that the State creating a corporation has the sole right to tax its intangible property 'unless such intangible property has acquired a "business situs" elsewhere.' Counsel for the State agrees with appellant on this point and in fact asserts 'that, generally, the taxable situs of accounts receivable and of money in bank is at the domicile of the owner.' But the State insists that the accounts receivable and bank deposits of the *Wheeling Steel Corporation* had acquired a taxable situs in West Virginia and that they have no taxable situs in Delaware, where the Corporation was chartered.

"Second.—The Corporation complied with the laws of the State of its creation in designating its 'principal' office in that State. It is manifest that this designation, while presumably sufficient for the purpose, was a technical one and that the office is not a principal office so far as the actual conduct of business is concerned. While a duplicate stock ledger and records of transactions with respect to capital stock are maintained in Delaware, the business operations of the Corporation are conducted outside that State. . . . To attribute to Delaware, merely as the chartering State, the credits arising in the course of the business established in another State, and to deny to the latter the power to tax such credits upon the ground that it violates due

process to treat the credits as within its jurisdiction, is to make a legal fiction dominate realities in a fashion quite as extreme as that which would attribute to the chartering State all the tangible possessions of the Corporation without regard to their actual location."

The case of *First Bank Stock Corporation v. Minnesota*, applied the principle of the *Wheeling Steel Corporation* case, to the taxation by the State of Minnesota of the shares of stock in various foreign corporations owned by a Delaware corporation which had its commercial domicile in Minnesota.

In view of the findings of the New Jersey Court, supported by ample evidence, that the appellant corporations had their business situs in the State of New York and that the property herein sought to be taxed was an integral part of such situs, there can be no doubt that under the authority of the *Wheeling Steel Corporation* and *First Bank Stock Corporation* cases, such property was subject to taxation by the State of New York. In view of this fact, it follows under the rule laid down in the foregoing cases that such property cannot be subject to taxation in the State of New Jersey. See *Farmers Loan & Trust Co. v. Minnesota*, *supra*, and *First National Bank v. Maine*, *supra*.

The following State decisions present the question which is raised on the present appeal and sustain the appellants' position:

Miami Coal Company v. Fox, 203 Ind. 99. This case involved the taxation by Indiana of the intangible personal property—bills and accounts receivable—of a domestic corporation. The corporation operated coal mines in Indiana and all of its intangibles resulted from the sale of coal mined in that State. It maintained its principal office, however, in Illinois, from which its coal was sold and its financial affairs were managed and con-

trolled. It was held by the Supreme Court of Indiana that the intangibles of the corporation had no taxable situs in Indiana but that the taxable situs was in Illinois. In the course of its opinion the Court said at pages 113 and 114:

"It has been suggested by the Supreme Court of the United States that, if the principles of taxation were homogeneous throughout the country and the individual States, property would be subject to taxation in but one of such jurisdictions. This is the foundation for the inference that property such as here in question ought to have one situs and one situs only. Either the gaining of a so-called business situs should emancipate the property from taxation at the domicile of the owner or the judicial construction of the principle upon which the so-called business situs is founded should be abolished. *Kidd v. Alabama* (1903), 188 U. S. 730, 732; * * * *Hawley v. City of Malden* (1914), 232 U. S. 1. . . .

"The contention of the appellces under the last question stated is peculiar and unique in contending that intangible personal property may have two situs, one a business situs and the other a taxable situs.

"Admitting that the property has a business situs in Illinois and a taxable situs in Indiana, the only foundation for the property being subject to taxation is the ancient maxim *mobilia sequuntur personam*. The seed of this maxim was not begotten by taxation. The rule is but a legal fiction to the effect that for legal purposes the situs or home of personal property is always at the domicile of its owner but this maxim may not be a premise or used in reasoning to the determination of the situs of the property for the purpose of taxation."

Commonwealth v. Appalachian Power Co., 159 Va. 462 (1932), certiorari denied 288 U. S. 613. In this case it was held that the State of Virginia could not tax certain bonds

owned by a domestic corporation which were deposited in New York with a trustee as collateral for a bond issue. In its opinion, after reviewing the decisions of the United States Supreme Court on the subject, the Court said, page 468:

"The conclusions from these opinions summarized by counsel for petitioner seem inescapable: (1) that no property can be subjected to taxation by more than one state; . . . (3) that the tax situs of tangibles (like real estate) is in the State where they are located, the fiction of *mobilia sequuntur personam* being no longer applicable to tangibles; . . . (5) that where intangibles are sought to be taxed the fiction of *mobilia sequuntur personam* may be applied, but this fiction must give way to the fact of legal title, possession and control in another State."

See also *Commonwealth v. Madden*, 265 Ky. 684 (1936), and *Matter of Brown*, 274 N. Y. 10 (1937).

III

The fact that the appellants do not pay a personal property tax in New York is of no significance.

The New Jersey Supreme Court in sustaining the tax here under review has seemed to attach great importance to the fact that the appellants pay no personal property tax to the State of New York (see Appendix, p. 34). It is respectfully submitted that such fact is of no significance. The jurisdiction of the State of New Jersey to impose a tax upon property which has its situs beyond its borders cannot be affected by whether the State in which the property has its situs taxes such property or not. This is a matter of domestic policy of the State in question, here the State of New York.

But an attempt to escape proper taxation in Ohio does not confer jurisdiction to tax property asserted to be in Indiana, which really lies outside and beyond the jurisdiction of that State. Jurisdiction of the State of Indiana to tax is not conferred or strengthened by reason of the motive which may have prompted the decedent to send into the State of Indiana these evidences of debts owing him by residents of Ohio."

Buck v. Beach, 206 U. S. 392, at page 402.

See also, *Commonwealth v. Appalachian Power Company*, *supra*, in which the Court said at page 471 of its opinion:

"The fact that the State of New York imposes no such tax on this class of property is immaterial. The controlling question is, has that State the right to tax the property? We think it has. If so, Virginia, under the decisions, has no such right."

It is true that the State of New York at the present time does not impose a tax on personal property, whether tangible or intangible. Tax Law, Consolidated Laws of New York, Chapter 60, Article 1, Section 3. This section, however, must be considered in the light of other taxes imposed upon corporations by the State of New York. These taxes for foreign business corporations take the form of a license tax upon the portion of their capital employed within the State (Consolidated Laws, Chapter 60, Article 9, Section 181) and a franchise tax based upon the proportion of their aggregate income allocated to the State of New York (Consolidated Laws, Chapter 60, Article 9-a, Sections 209, 214). In the case of insurance companies, these taxes take the form of taxes based upon the amount of premiums collected in the State. See Tax Law, Consolidated Laws, Chapter 60, Article 9, Section

187; Insurance Law, Consolidated Laws, Chapter 28, Sections 133, 137 and 169-a. It is of record in this case that the appellants paid premium taxes to the State of New York (R. p. 33).


The policy of the State of New York with respect to the exemption of personal property from taxation can be changed at any time and it is respectfully submitted that the right of New Jersey under the Fourteenth Amendment to tax property which has its situs in New York cannot be predicated upon any such uncertainty.

Conclusion

The question which is before the Court cannot be better stated than in the following excerpt from a recent work "Double Taxation of Property and Income" by Professor A. L. HARDING, published in 1933 by the Harvard University Press:

"* * * The Court, if it is to continue its praiseworthy movement against double taxation of intangibles, must within the near future either strike down these categories (business situs of credits and corporate excess) as the basis of independent situs, or forbid the taxation of such intangibles at the domicile. That it should do the first is almost inconceivable. These two types of intangibles owe their entire value to the society into which they are integrated. They are engaged in keen competition with capital and credits belonging to persons within that society. To remove from taxation credits belonging to nonresidents, and in competition more or less permanently with local credits and capital, would have most serious economic consequences. The only answer to be allowed is that the domiciliary taxation must cease. The *mobilia* maxim is but a fiction, a presumption of fact. It has never been more than that, no matter with what pomp it has been chanted. We have in these two cases, business situs and corporate excess, facts which

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show that the fiction is entirely false to the facts, and that the presumption based thereon has been entirely overcome. The Court must do precisely the thing which it first did in the *Union Transit* case, and hold that the domiciliary taxation must cease."

We submit that the question as thus stated has already been answered by this Court in the recent cases of *Wheeling Steel Corporation v. Fox, supra*; *First Bank Stock Corporation v. Minnesota, supra*; *State ex rel. Whitney v. Graves, supra*.

It is respectfully submitted that the judgment of the New Jersey Court of Errors and Appeals should be reversed.

Respectfully submitted,

JOHN G. JACKSON,
J. G. SHIPMAN,
PAUL B. BARRINGER, JR.,
Attorneys for Appellants.

New York, January , 1939.

APPENDIX

EXHIBIT A

Statutes of the State of New Jersey, the validity of which is involved in this proceeding:

Second.

Statute of the State the validity of which is involved.
Chapter 236 of the Laws of 1918,

Section 202:

"All property, real and personal, within the jurisdiction of this state, not expressly exempted by this act or excluded from its operation, shall be subject to taxation annually under this act at its true value, and shall be valued by the assessors of the respective taxing districts. Property omitted by the assessors may be assessed as hereinafter provided. All property shall be assessed to the owners thereof with reference to the amount owned on the first day of October in each year, and the persons so assessed for personal property shall be personally liable for the taxes thereon. (P. L. 1918, p. 848.)"

Section 301:

"The tax on all tangible personal property in this State and on all taxable personal property of non-residents of this State shall be assessed in and for the taxing district where such property is found. The tax on other personal property shall be assessed on each inhabitant in the taxing district where he resides on the first day of October in each year. . . . [Balance of Section 301 not material to this proceeding.] (P. L. 1918, p. 853, as amended by P. L. 1920, p. 561.)"

Section 307:

"Every fire insurance company and every stock

be assessed in the taxing district where its office is situate, upon the full amount of its capital stock paid in and accumulated surplus; the real estate belonging to every such corporation, however, shall be taxed in the taxing district where such real estate is situated, and the amount of assessment upon said real estate shall be deducted from the amount of any assessment made upon the capital stock and accumulated surplus, as herein provided for; no franchise tax shall be imposed upon any such fire insurance company or other stock insurance company included in this section. (P. L. 1918, p. 858.)"

These sections were in effect at the time this tax was levied, but have since been revised and are now found in Revised Statutes of New Jersey, 1937, Sections 54:4-1, 54:4-9 and 54:4-22:

"54:4-1. Property subject to tax; date of assessment. All property, real and personal, within the jurisdiction of this state not expressly exempted from taxation or expressly excluded from the operation of this chapter shall be subject to taxation annually under this chapter at its true value, and shall be valued by the assessors of the respective taxing districts. Property omitted by the assessors may be assessed as hereinafter provided. All property shall be assessed to the owner thereof with reference to the amount owned on October first in each year, and the person so assessed for personal property shall be personally liable for the taxes thereon."

"54:4-9. Personal property; where assessed. The tax on all tangible personal property in this state and on all taxable personal property of non-residents of this state, except as otherwise provided in this title, shall be assessed in and for the taxing district where the property is found. The tax on other personal property shall be assessed on each inhabitant in the taxing district where he resides on October first in each year."

EXHIBIT B

NEW JERSEY SUPREME COURT

MAY TERM, 1937.

No. 208.

NEWARK FIRE INSURANCE COMPANY, *Prosecutor*,

v.

STATE BOARD OF TAX APPEALS and CITY OF NEWARK, a
Municipal Corporation of the State of New Jersey,
Respondents.

Submitted May —, 1937. Decided August 31, 1937.

On Certiorari.

Before Justices Bodine, Heher and Perskie.

For prosecutor: Arthur T. Vanderbilt.

For respondents: Frank A. Boettner, John A. Matthews.

The opinion of the court was delivered by PERSKIE, J.:

The question before us concerns the validity of the personal property assessment made by the City of Newark on October 1, 1934, for the year 1935 against prosecutor. The assessment was made in accordance with our general tax act. P. L. 1918, chap. 307, p. 858, as amended.

Prosecutor is a general fire insurance company organized under the laws of this state with its registered office at 31 Clinton Street, in the City of Newark. For six years prior to the assessment its main and executive offices have been and now are at 150 William Street, in the City of New York. Prosecutor's general business is conducted in New York, and all the books of the company, except those required by law to be kept at its registered office in New

Jersey, are located there. Although a small amount of cash and some few securities are kept in New Jersey so that business may be done here, the great majority of these items is either in the New York Offices or in banks in that State. The business conducted at the Newark office is confined to local regional underwriting and the adjustment of claims arising therefrom. Reports on such business are sent to the main office in New York. The record also discloses that prosecutor pays no personal property tax in New York, and, for aught that appears, no such tax is exacted by that State.

The State Board of Tax Appeals affirmed the assessment as made by the taxing authorities of Newark thereby assessing the intangible property owned by prosecutor. This court granted certiorari and prosecutor argues that the assessment as made should be reduced because (1) New Jersey has no jurisdiction to tax the intangibles; and (2) because it was error to include the item of unearned premium reserve as a taxable asset.

First. *As to jurisdiction to tax prosecutor in this State.* This question must, in light of the proofs, be considered upon the inescapable premise that prosecutor had its business *situs* as of October 1, 1934, and still has it, in New York; that the securities, the personalty involved, have become an integral part of its business *situs* in New York; but that prosecutor pays no personal property tax to the State of New York.

It is fundamental that jurisdiction to tax depends primarily on the type of tax sought to be exacted and the property that is subject to the tax. Here the tax, under the act, is a personal property tax. The property subject to the tax constitutes securities which represent paid in capital stock and accumulated surplus of the company. Such securities are clearly intangibles. It is well settled that intangible personalty is taxable at the domicile of the owner. *Kirtland v. Hotchkiss*, 100 U. S. 491; *Blodgett v.*

Silberman, 277 U. S. 1; Farmers Loan & Trust Co. v. Minnesota, 280 U. S. 204. That principle finds its support in the legal maxim *mobilia sequuntur personam*. The use of this maxim like the use of most other maxims in jurisprudence, is not the solution of the problem; it is merely a formal and unexplanatory statement of a legal conclusion. Cf. 9 Harvard Law Review 13; 8 Am. L. Rev. 519. Thus frequently its use is not very helpful. But since contrary to the case of tangibles, intangibles have no actual *situs*, are not physically under the definite control of any one jurisdiction, the rule, as embraced in the maxim developed is justified even to this day as a rule of convenience. Convenience however brings hardship. So it was not long before exceptions to the general rule as stated gradually found and worked themselves into the law. Thus it has been held that where intangible personal property became an integral part of a business carried on in a state other than that of the domicile of the owner of the intangibles, then that other state, the state wherein the intangibles acquired a "business *situs*" had jurisdiction to levy a personal property tax upon these intangibles. New Orleans v. Stempel, 175 U. S. 309; Metropolitan Life Ins. Co. of N. Y. v. New Orleans, 205 U. S. 395; Wheeling Steel Corp. v. Fox, 298 U. S. 193; Safe Deposit & Trust Co. v. Virginia, 280 U. S. 583; Farmers Loan & Trust Co. v. Minnesota, 230 U. S. 204; First National Bank of Boston v. Maine, 284 U. S. 312, see 76 A. L. R. 806. Conceding the application of this exception to the general rule, the problem soon arose as to whether, when the "business *situs*" theory did apply, the state of the domicile could still tax. The answer to that question is not free from serious doubt, a doubt which the Supreme Court of the United States has sounded notwithstanding its holding that the state of the domicile might tax even though the "business *situs*" theory applied. Cream of Wheat Co. v. County of Grand Forks, 253 U. S. 325. It is interesting to observe the growing tendency of this

doubt. It manifests itself both prior to and subsequent to the holding in the Cream of Wheat case. For example, in the case of Union Refrigerator Transit Co. v. Kentucky, 199 U. S. 194, decided prior to the Cream of Wheat case, and in the case of Frick v. Pennsylvania, 268 U. S. 473, (overruled on other grounds) it was held that tangible property may be taxed only by one state; and again the court has held, since the Cream of Wheat case, that in the absence of the applicability of the "business situs" exception, only the state of the domicile might tax intangibles. Farmers Loan & Trust Co. v. Minnesota, *supra*; Baldwin v. Missouri, 281 U. S. 586; Beidler v. South Carolina Tax Commission, 282 U. S. 1; First National Bank of Boston v. Maine, *supra*. In so holding the court was very careful to point out, notwithstanding its holding in the Cream of Wheat case, that the question involving the right of the domiciliary state to tax when the "business situs" exception applied is an open one. Decision thereof has been expressly reserved. Cf. Farmers Loan & Trust Co. v. Minnesota, *supra*, at p. 213, and First National Bank of Boston v. Maine, *supra*; at p. 331. While the doubt has been cast by the highest court of our land, that body has never expressly overruled its decision in the Cream of Wheat case. Until such time as that case is reconsidered, we are bound by its holding that there is a sufficient interrelation between the state of the domicile and the intangibles which have acquired a business situs elsewhere to justify the imposition of a personal property tax by the former upon the latter.

Nor do we, by so deciding run afoul of the strong modern sentiment against multiple taxation as manifested by the United States Supreme Court. See Farmers Loan & Trust Co. v. Minnesota, *supra*, at p. 212; First National Bank of Boston v. Maine, *supra*, at p. 326, 334. For, as has been pointed out, prosecutor pays no personal property tax in New York. Thus under the circumstances here exhibited multiple taxation is impossible. Prosecutor

may not invoke the dictum that "the rule of immunity from taxation by more than one state . . . is broader than the application thus far made of it." *First National Bank of Boston v. Maine, supra*, at p. 326.

Second. *As to the item of unearned premium reserve.*

We are aware of the fact that sound accounting practice may require this item to be booked as a liability. Nor are we unmindful of the many things that may be said in favor of such a requirement. Modern statistical analyses available to companies in the position of prosecutor may and do compute to a very accurate degree just what part of such reserve will be expended each year. But companies control the fund so set up. They invest them and earn a return upon them. Because of these factors our sister states have divided upon the answer to this problem. See 13 A. L. R. 189, *et seq.* Our Court of Errors and Appeals has taken the position that this item, at least for the purpose of taxation, should be considered an asset. *City of Trenton v. Standard Fire Ins. Co.*, 77 N. J. L. 575, 73 At. 606. Whether the reserve set up consists of exempt securities, and the exemption of the reserve fund as claimed would thus result in a double deduction is not made clear. But be that as it may, this court is bound by the decision in the case of *City of Trenton v. Standard Fire Ins. Co., supra*.

Third. The parties stipulated before the Board that prosecutor had cash on hand or on deposit as of October 1, 1934 of \$532,784.54 of which amount the sum of \$6,425.32 was deposited in banks of New Jersey and the balance of \$526,359.22 represents cash on hand in either the New York office or on deposit in New York banks. The State Board determined that this item was exempt under P. L. 1933, chap. 165, p. 346. Respondents argument that this determination is incorrect, if properly before us, is sound. Prosecutors cash on hand or on deposit of October 1, 1934

was not exempt; it was taxable. *Newark v. State Board of Tax Appeals*, 118 N. J. L. 131, 191 At. 843. We are, of course, under section 11 of our Certiorari act (1 C. S. (1709-1910) p. 402-406), obliged to "determine disputed questions of fact as well as of law * * *" but that, under the circumstances exhibited and generally stated, means disputes, as to facts or law or both, properly raised. Is the point properly before us? We think not. True, it was raised and disputed before the State Board of Tax Appeals; the latter passed judgment upon it. But it is also true that, save as to the argument made here upon the point, respondents permitted the judgment of the Board to stand unchallenged. It cannot now properly be heard to complain. The fact of the matter is that, notwithstanding its argument to the contrary, respondents conclude their brief with the submission "that the judgment of the State Board of Tax Appeals should be affirmed and the writ of certiorari dismissed."

The judgment of the State Board of Tax Appeals is, therefore, affirmed with costs.

A true copy.

FRED L. BLOODGOOD,
Clerk.

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SUPREME COURT OF THE UNITED STATES.

Nos. 449 and 456.—OCTOBER TERM, 1938.

Newark Fire Insurance Company, Ap-
pellant,

449 vs.

State Board of Tax Appeals and The
City of Newark.

Universal Insurance Company and
Universal Indemnity Insurance Com-
pany, Appellants,

456 vs.

State Board of Tax Appeals of the
State of New Jersey and the City
of Newark.

Appeals from the Court of
Errors and Appeals of
the State of New Jersey.

[May 29, 1939.]

Mr. Justice REED announced an opinion in which the CHIEF Jus-
tice, Mr. Justice BUTLER and Mr. Justice ROBERTS concurred.

The controversy in No. 449 relates to the jurisdiction of New
Jersey to tax the appellant upon the full amount of its capital
stock paid in and accumulated surplus. The case is here by appeal
under Section 237(a) of the Judicial Code.¹

Chapter 236 of the Laws of 1918² is a general act for the assess-
ment and collection of taxes. Section 202 subjects all real and
personal property within the jurisdiction of New Jersey to taxa-
tion annually at its true value. By Section 301 the tax on other
than tangible personal property is assessed on each inhabitant in
the taxing district of his residence on the first day of October in
each year. Section 305 deals with domestic corporations as resi-
dents of the district in which their chief office is located and ren-
ders their personal property taxable in the same manner as that of

¹ 29 U. S. C. § 344(a).

² N. J. Laws 1918, p. 847; also in N. J. Rev. Stats. 1937, § 54:4.

individuals, except as otherwise provided. Section 307, the most vital in the case, provides:

"Every fire insurance company and every stock insurance company other than life insurance shall be assessed in the taxing district where its office is situate, upon the full amount of its capital stock paid in and accumulated surplus; . . . no franchise tax shall be imposed upon any such fire insurance company or other stock insurance company included in this section."

The appellant is a stock fire insurance corporation organized under the laws of New Jersey which at the time of this assessment required it to locate its principal office and to conduct its general business in the state.³ It is stipulated that a registered office is maintained in Newark, New Jersey, together with such books as the law requires to be kept within the state. The only business carried on in this Newark office is a local or regional claim and underwriting department for Essex and three other counties. No executive officer is there and reports are sent to the New York office. The stipulation further shows that the company's "executive officers and its executive office are located at 150 William Street, New York City. The general accounts of the company are kept in the office in New York City. The general accounting, underwriting and executive offices of the company are all located at the main office at 150 William Street, New York City. All cash and securities of the company are located there or in banks in that City or in other banks outside of the State of New Jersey, with the exception of the sum of \$6,425.32 on deposit in New Jersey banks. All of the general affairs of the company are conducted at the main office in New York City and have been so conducted there since appellant moved its main office from Newark six years ago." No personal property tax is paid in New York. The company does pay there a franchise tax based upon premiums.

The Board of Assessment of the City of Newark made an assessment, as of October 1, 1934, upon the capital stock paid in and accumulated surplus of the appellant, with deductions for debts and exemptions allowed by law. The assessment was sustained, in succession, by the Essex County Board of Taxation, by the New Jersey State Board of Tax Appeals, now an appellee, by the

³N. J. Laws 1902, c. 134, section 3, second, 408; N. J. Laws 1929, c. 6, section 3, second, p. 18, and c. 47, section 1, p. 82. By c. 164 of N. J. Laws 1937, this was amended to read that the certificate of incorporation must set forth "the place where the principal office of the said company in this State is to be located."

Supreme Court,⁴ and by the Court of Errors and Appeals, the highest court in the state.⁵ Throughout the proceedings below the appellant resisted the jurisdiction of New Jersey to tax on the ground that its intangibles had acquired a business situs and the corporation a tax domicile in New York. Throughout, the state tribunals treated the assessment as upon personal property with a business situs in the sister state. The Supreme Court characterized the taxation as a personal property tax and discussed its validity in the light of the proofs . . . upon the inescapable premise that . . . the securities, the personalty involved, have become an integral part of [appellant's] business situs in New York . . .⁶ It held that the state of domicile may impose a personal property tax upon intangibles which have acquired a business situs in another state and added that, in the absence of a New York personal property tax, multiple taxation was impossible. The Court of Errors and Appeals of New Jersey, per curiam, affirmed the judgment for the reasons expressed in the opinion of the Supreme Court.⁷

Appellant urges error in sustaining the assessment in the face of the conclusion that the tax is a property tax upon intangibles with a business situs in New York, the commercial domicile of the corporation. Such approval, it is claimed, violates the due process clause of the 14th Amendment.

The present tax, as administered, is levied upon an assessment of the full amount of capital stock and surplus. It is a tax on the net value of the corporation less allowable deductions, reached by taking liabilities from gross value of assets and subtracting exempt items from the remainder. This is apparently because capital stock and surplus are treated as invested in the exempt assets.⁸ The value thus assessed is not determined by specific items but is the result of a calculation in which all assets are involved except those definitely exempted. Our conclusion makes it unnecessary to resolve doubts as to whether this is a property tax.

When a state exercises its sovereign power to create a private corporation, that corporation becomes a citizen, and domiciled in the

⁴118 N. J. L. 525.

⁵120 N. J. L. 185.

⁶118 N. J. L. at 526.

⁷120 N. J. L. 185.

⁸Fidelity Trust Co. v. Board of Equalization, 77 N. J. L. 128, 130.

4 *Newark Fire Ins. Co. vs. State Board of Tax Appeals.*

jurisdiction, of its creator.⁹ There it must dwell.¹⁰ The dominion of the state over its creature is complete.¹¹ In accordance with the ordinary recognition of the rule of *mobilia sequuntur personam* to determine the taxable situs of intangible personalty,¹² the presumption is that such property is taxable by the state of the corporation's origin.¹³ This power of New Jersey to tax is made effective by section 307 of the Act of 1918, heretofore quoted. It is the only tax sought by the state from corporations of this type, as the franchise tax, at one time levied,¹⁴ was repealed by the Act of April 8, 1903.¹⁵

There are occasions, however, when the use of intangible personalty in other states becomes so inextricably a part of the business there conducted that it becomes subject to taxation by that state.¹⁶ The carrying on of the business of the corporation in New York, it is urged, has withdrawn its intangibles completely from the tax jurisdiction of New Jersey. With the assumption of a business situs and commercial domicile in New York, that state, under the authorities cited, would have the right to tax intangibles with this relation to its sovereignty. Appellant contends that if New York may levy a property tax on these intangibles, it will violate the due process clause of the 14th Amendment to permit New Jersey to do the same thing; that property cannot be in two places; that if it is in New York for tax purposes, it cannot be in New Jersey. We are asked to decide that both states have not the power to tax the same property for the same incidents. This question has been

⁹ *Lafayette Insurance Co. v. French*, 18 How. 404; *St. Louis v. Wiggins Ferry Co.*, 11 Wall. 423, 429; *Seaboard Rice Milling Co. v. Chicago, R. I. & P. R. Co.*, 270 U. S. 363, 266; *Fairbanks Steam Shovel Co. v. Wills*, 240 U. S. 642. Cf. *International Milling Co. v. Columbian Transp. Co.*, 292 U. S. 511, 519.

¹⁰ *Bank of Augusta v. Earle*, 13 Pet. 519, 588.

¹¹ *Oklahoma Gas Co. v. Oklahoma*, 273 U. S. 257, 259; *Canada Southern Ry. v. Gebhard*, 109 U. S. 527, 537, 38.

¹² *Safe Deposit & Trust Co. v. Virginia*, 280 U. S. 83, 92; *Blodgett v. Sherman*, 277 U. S. 1, 9.

¹³ *Cream of Wheat v. Grand Forks*, 253 U. S. 325, 329; *Virginia v. Imperial Coal Sales Co.*, 292 U. S. 15, 19; *First Bank Stock Corp. v. Minnesota*, 301 U. S. 234, 237. Cf. *Johnson Oil Co. v. Oklahoma*, 290 U. S. 158, 161.

¹⁴ Act of April 18, 1884, N. J. Laws 1884, c. 159, p. 232.

¹⁵ N. J. Laws 1903, c. 208, p. 394.

¹⁶ *New Orleans v. Stempel*, 175 U. S. 309; *Bristol v. Washington County*, 177 U. S. 133; *State Board v. Comptoir National D'Escompte*, 191 U. S. 388; *Metropolitan Life Ins. Co. v. New Orleans*, 205 U. S. 395; *Liverpool and L. & G. Co. v. Board of Assessors*, 221 U. S. 346; *Wheeling Steel Corporation v. Fox*, 298 U. S. 193; *First Bank Stock Corp. v. Minnesota*, 301 U. S. 234.

heretofore reserved.¹⁷ We do not find it necessary to answer it in this case.

Where consideration has been given to the existence of a business situs of intangibles for taxation by a state other than the state of domicile, there has been definite evidence that the intangibles were integral parts of the business conducted. In so far as the conclusion as to the existence of a business situs for the purpose of taxation, distinct from the domiciliary situs, is the basis for a claim of a Federal right, the duty of inquiring into the evidence which establishes such business situs rests upon this Court.¹⁸

In the *Stempel*, *Bristol*, *Comptoir National*, *Metropolitan* and *Liverpool* cases, cited in note 16, *supra*, the integration of the foreign-owned intangibles with local activities was evident from the continued course of business. The presence or absence of the evidences of the credits from the jurisdiction was immaterial.¹⁹ The non-resident individuals and corporations carried on continuously a course of lending money or granting credits within the taxing states. The taxed intangibles grew out of these transactions. They were, in fact, a part of them. In the *Wheeling Steel* case, the same type of amalgamation occurred. West Virginia sought to tax a Delaware corporation on accounts receivable and bank deposits. The opinion points out, pages 212 and 213, that these choses in action were the indebtedness for or the proceeds of sales confirmed in West Virginia, attributable "to the place where they arise in the course of the business of making contracts of sale." In *First Bank Stock Corporation v. Minnesota* another Delaware corporation was found to have established a commercial domicile for itself and given a business situs to certain of its intangibles. The intangibles in question were stocks of Montana and North Dakota state banks, purchased and held as part of the corporation's assets in its Minnesota business of holding the shares and managing, through stock ownership, the business of numerous banks, trust companies and other financial institutions of the Ninth Federal Reserve District. As this business was localized in Minnesota, the stocks of these banks were an essential factor of that business and therefore had a taxable situs in Minnesota.

¹⁷ *First Bank Stock Corp. v. Minnesota*, 301 U. S. 234, 237, 241. Cf. *Farmers Loan and Trust Co. v. Minnesota*, 280 U. S. 204, 213; *First Nat. Bank v. Maine*, 284 U. S. 312, 331.

¹⁸ *Beidler v. So. Car. Tax Commission*, 282 U. S. 1, 8 and cases cited.

¹⁹ *Metropolitan Life Ins. Co. v. New Orleans*, 205 U. S. 395, 402.

6 *Newark Fire Ins. Co. vs. State Board of Tax Appeals.*

The conception of a business situs for intangibles enables the tax gathering entity to distribute the burden of its support equitably among those receiving its protection. It makes the notion of a tax situs for particular intangibles more definite. It is not the substitution of a new fiction as to the mass of choses in action for the established fiction of a tax situs at the place of incorporation. To overcome the presumption of domiciliary location, the proof of business situs must definitely connect the intangibles as an integral part of the local activity. The facts presented by this record fall far short of this requirement.

The tax is upon "the full amount of capital stock and surplus less certain allowed deductions of real estate and exempt securities. The evidence gives no explanation of the amount or source of the assets making up the amount \$3,370,080.66 which balances with the capital stock and surplus less these deductions. The stipulation shows "agreed" figures: \$8,107,901.83 presumably of capital and surplus, as shown below.²⁰ Agreed deductions are \$4,737,821.17. But the assessment is \$1,069,000. From the stipulation, we learn the "general accounts" are kept in New York City and all cash except \$6,425.32 and all securities are located at the New York office or in banks outside of New Jersey. If we assume that the "general accounts" mentioned are the company's claims against agents, other insurance companies, and similar bills receivable, no progress is made towards their identification with New York business. Nothing is shown as to the volume of New York business in comparison with New Jersey or the other states. We are not told

²⁰ "(a) The following figures have been agreed upon. In the first column appears the designation of what the fund represents; opposite each designation appearing the amount of the fund in question:

1. Capital stock	\$2,000,000.00
2. Surplus (as set forth in the books of the company) ..	2,982,940.29
3. Reserve for unearned premiums	3,001,623.46
4. Reserve for taxes	71,765.65
5. Reserve for contingencies	68,915.35
6. Reserve for reinsurance	4,228.36
7. Agency balances over 90 days old	119,109.72
8. Furniture and fixtures (in Newark office)	1,500.00
Total	\$8,250,082.83

Reserves for unearned premiums and for reinsurance are a taxable asset New Jersey. *City of Trenton v. Standard Fire Ins. Co.*, 77 N. J. L. 537, 70 65. The Board of Tax Appeals held the agency balances an asset, and the reserve for taxes a liability which is deductible. Nothing was said about the reserve for contingencies. Addition of the items known to constitute assets—capital stock, surplus, reserve for unearned premiums, reserve for reinsurance, agency balances—equals \$8,107,901.83.

where business is accepted, moneys collected or insurance contracts made. The securities may represent local loans or investments in New Jersey or elsewhere made from funds derived from similar insurance contracts with a business situs at those points.²¹ They may be the result of insurance activities of many kinds, taking place far from New York. If we were to assume that the intangibles of a corporation may have only one taxable situs, the mere fact that general affairs of a foreign corporation are conducted by general officers in New York without further evidence of the source and character of the intangibles does not destroy the taxability of a part of these intangibles by the state of the corporation's legal domicile. The presumption of a taxable situs solely in New Jersey is not overturned.

Universal Insurance Company and Universal Indemnity Insurance Company have appeals involving the same questions. By stipulation these cases were consolidated for review below and appeal here.

These appellants are New Jersey insurance corporations, assessed by the City of Newark in the same way, under the same statute and with the same result in the state courts as the appellant in No. 449.

There are no significant distinctions between the cases. A management corporation handles these companies at a New York office, where accounts are payable. Seven per cent of the business of Universal Insurance Company originates in New Jersey. The corresponding percentage for the other company is not shown. As in No. 449, the record is silent as to the character, source and use of the securities and credits.

~~The judgments of both courts are~~

~~affirmed.~~

A true copy.

Test:

Clerk, Supreme Court, U. S.

²¹ Metropolitan Life Ins. Co. v. New Orleans, 205 U. S. 395.

SUPREME COURT OF THE UNITED STATES.

Nos. 449 and 456.—OCTOBER TERM, 1938.

Newark Fire Insurance Company, Ap-
pellant,

449

vs.

State Board of Tax Appeals and The
City of Newark.

Universal Insurance Company and
Universal Indemnity Insurance Com-
pany, Appellants,

456

vs.

State Board of Tax Appeals of the
State of New Jersey and the City
of Newark.

Appeal from the Court of
Errors and Appeals of
the State of New Jersey.

[May 29, 1939.]

Mr. Justice FRANKFURTER announced the following opinion, con-
curred in by Mr. Justice STONE, Mr. Justice BLACK, and Mr. Justice
DOUGLAS.

Wise tax policy ~~is one thing~~; constitutional prohibition quite
another. The task of devising means for distributing the burdens
of taxation equitably has always challenged the wisdom of the
wisest financial statesmen. Never has this been more true than
today when wealth has so largely become the capitalization of ex-
pectancies derived from a complicated network of human relations.
The adjustment of such relationships, with due regard to the pro-
motion of enterprise and to the fiscal needs of different govern-
ments with which these relations are entwined, is peculiarly a phase
of empirical legislation. It belongs to that range of the experi-
mental activities of government¹ which should not be constrained by

¹ Compare *Anderson v. Dunn*, 6 Wheat 204, 226: "The science of govern-
ment is the most abstruse of all sciences; if, indeed, that can be called a
science which has but few fixed principles, and practically consists in little
more than the exercise of a sound discretion, applied to the exigencies of the
state as they arise. It is the science of experiment."

2 *Newark Fire Ins Co. vs. State Bd. of Tax Appeals of Newark*

rigid and artificial legal concepts. Especially important is it to abstain from intervention within the autonomous area of the legislative taxing power where there is no claim of encroachment by the states upon powers granted to the national government. It is not for us to sit in judgment on attempts by the states to evolve fair tax policies. When a tax appropriately challenged before us is not found to be in plain violation of the Constitution our task is ended.

Chapter 236 of the New Jersey Laws of 1918, as applied to the circumstances of these two cases, clearly does not offend the Constitution. In substance, such legislation has heretofore been found free from constitutional infirmity. *Cream of Wheat Co. v. Grand Forks*, 253 U. S. 325, affirming 41 N. Dak. 330. During all the vicissitudes which the so-called "jurisdiction-to-tax" doctrine has encountered since that case was decided, the extent of a state's taxing power over a corporation of its own creation, recognized in the *Cream of Wheat* case, has neither been restricted nor impaired. That case has not been cited otherwise than with approval.² Questions affecting the fictional "situs" of intangibles, which received full consideration in *Curry v. McCannless*, decided this day, do not concern the present controversies. *Cream of Wheat Co. v. Grand Forks*, *supra*, and the cases that have followed it, afford a wholly adequate basis for affirming the judgments below.

² See *Citizens National Bank v. Durr*, 257 U. S. 99, 109; *Schwab v. Richardson*, 263 U. S. 83, 92; *Baker v. Drusedow*, 263 U. S. 137, 141; *Swiss Oil Corp. v. Shanks*, 273 U. S. 407, 413; *Hellmich v. Hellman*, 276 U. S. 233, 238; *Montgomery Ward & Co. v. Emmerson*, 277 U. S. 573; *Educational Films Corp. v. Ward*, 282 U. S. 379, 391; *Nebraska ex rel. Beatrice Creamery Co. v. Marshall*, 282 U. S. 799, 800; *First Bank Stock Corp. v. Minnesota*, 301 U. S. 234, 237.

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